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FAIR TRIAL AND FREE EXPRESSION

A BACKGROUND REPORT

PREPARED FOR AND PRESENTED TO THE

SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

Printed for the use of the Committee on the Judiciary

The views contained in this report are the views of the authors and do not necessarily reflect the views of the committee or its staff.

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PREFACE

Freedom of expression and the right to a fair trial are two of the fundamental precepts of a free society. Both interests enjoy constitutional status—in the First Amendment's protection of free speech and press, in the Sixth Amendment's assurance of those procedures thought necessary to secure a fair trial, and the Fifth Amendment's guarantee of due process of law.

This report on fair trial and free expression was undertaken at the request of the Subcommittee on Constitutional Rights of the Senate Judiciary Committee. Its purpose is to explore fair trial-free expression issues and to aid the Subcommittee in determining whether hearings or legislation would be useful. The report considers relevant case law, proposals, and reports (such as those of bar associations and other groups) and offers commentary and recommendations for the Subcommittee's consideration.

The research for this report was largely complete by March 1, 1976. After the report had been written, the Supreme Court decided *Nebraska Press Association* v. *Stuart*, 96 S. Ct. 2791 (1976), in which the Court struck down a Nebraska court order restricting press coverage of a murder trial in that state. The Court's decision in *Nebraska Press* reinforces the conclusions reached in this report, and the bearing of that decision on the fair trial-free expression issue is summarized in an addendum to the report.

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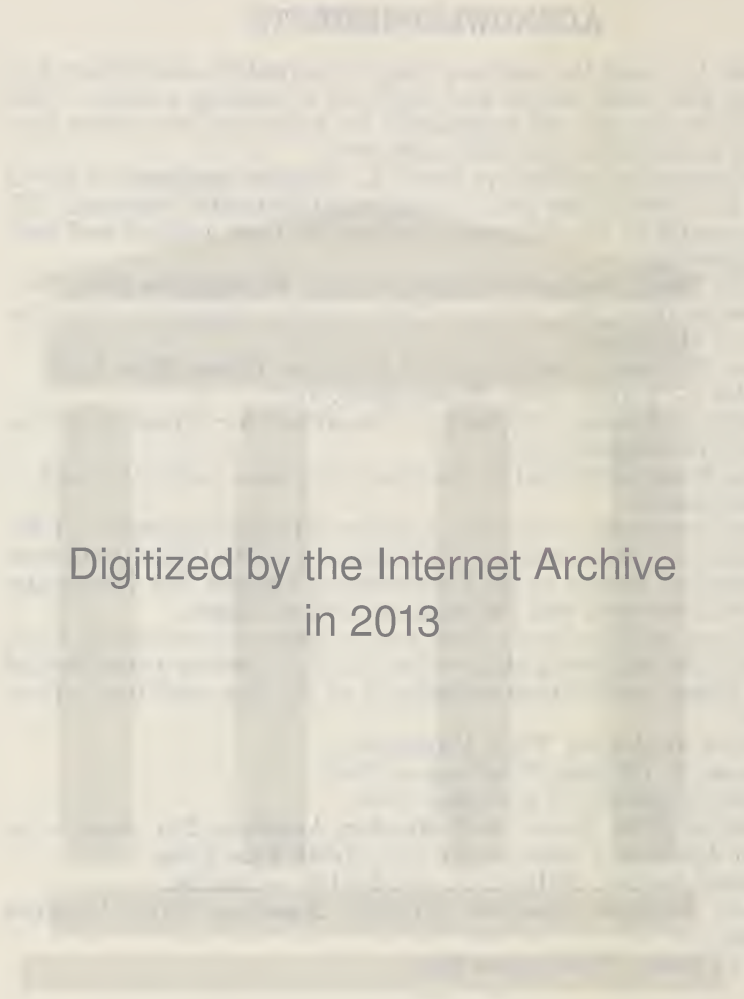

CONTENTS

FAIR TRIAL AND FREE EXPRESSION

A Background Report Prepared for and Presented to the Subcommittee on Constitutional Rights, U.S. Senate Committee on the Judiciary*

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I. Introduction

A. BACKGROUND

> On this side lay Scylla, while on that Charybdis in her terrible whirlpool was sucking down the sea.
>
> —The Odyssey.

The fair trial-free expression controversy implicates two of our most fundamental civil liberties. On one side lies danger that the Sixth Amendment guarantee of a fair trial by an impartial jury will go unfulfilled because of highly prejudicial publicity. On the other lies danger that the First Amendment guarantees of freedom of speech and press will be undermined by our efforts to limit prejudicial publicity.

This dilemma is by no means a modern invention.[1] It has attained new proportions, however, as the development of modern communications and newsgathering has made wide dissemination of information regarding pending litigation commonplace. Over the course of the last decade, other events have joined with these technological developments to focus attention on the fair trial-free expression problem.

In 1964, the Warren Commission report on the assassination of President Kennedy criticized the publicity surrounding the arrest of Lee Harvey Oswald and declared "it would have been a most difficult task to select an unprejudiced jury, either in Dallas or elsewhere." [2] The Commission concluded that the Oswald experience was "a dramatic affirmation of the need for steps to bring about a proper balance between the right of the public to be kept informed and the right of the individual to a fair and impartial trial." [3]

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*For a comment on *Nebraska Press Ass'n* v. *Stuart*, decided after this report was submitted to the Subcommittee, see Addendum, *infra* p. 81.

[1] See Judicial Conference of the United States, "Report of the Committee on the Operation of the Jury System on the "Free Press-Fair Trial." 45 F.R.D. 391, 394 n.2 395 (1969) [hereinafter cited as *Kaufman Report*], which notes that there were charges of prejudicial publicity in the trial of Aaron Burr in 1807, and lists a number of early examples "of the impact of widespread and uncontrolled inflammatory publicity upon the administration of criminal justice."

[2] *Report of the President's Commission on the Assassination of President Kennedy* (Washington, D.C., 1964), p. 238.

[3] *Id.*, p. 99.

78-342—76——2

The following year, the Senate Judiciary Committee's Subcommittee on Constitutional Rights met jointly with the Subcommittee on Improvements in Judicial Machinery to hold hearings on S. 290 and the fair trial-free expression problem.[4] Though no further action was taken on the bill, the hearings brought forth a wide range of expertise and opinion on the subject and signaled the beginning of a new era of concern over fair trial-free expression issues.

Another year later, in 1966, a series of Supreme Court decisions climaxed in the reversal of Dr. Sam Sheppard's murder conviction on the ground that prejudicial publicity and a chaotic courtroom atmosphere had deprived him of his right to a fair trial. *Sheppard* v. *Maxwell*[5] "laid down a mandate to the courts to deal with the problems caused by the impact of publicity on the jury system,"[6] announcing that the courts "must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences."[7]

In the same year, the American Bar Association issued a tentative draft of its comprehensive Reardon Report on fair trial-free expression, proposing restrictions on the release of information by attorneys, law enforcement officers, and court officials, urging that judicial proceedings be more frequently closed to the press and public, and approving use of the contempt power to restrict publication by the press under certain very limited circumstances.[8] This report was followed in rapid succesion by reports of the Amerian Newspaper Publishers Association,[9] the Association of the Bar of the City of New York,[10] and the Judicial Conference of the United States.[11]

The Judicial Conference's Kaufman Report was virtually a directive to the federal courts and is therefore of special significance to this study. It adopted verbatim the ABA recommendations restricting the release of information by attorneys, proscribed any release by judicial employees of information not already in the public record, and suggested that in sensational cases it might be appropriate to prohibit extrajudicial statements by trial participants. The report also recommended more liberal use of "traditional techniques" to insure juror impartiality such as continuance, change of venue, sequestration of jurors and witnesses, voir dire examination of prospective jurors, and cautionary instructions to the jury.

State and federal courts have responded to these events with increased efforts to prevent prejudicial publicity from reaching the jury. Sometimes those efforts have involved only the use of "traditional techniques" and have threatened neither the freedom of the press nor the larger interests in public information which underlie the First

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[4] Hearings Before the Subcommittee on Constitutional Rights and the Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, United States Senate, Eighty-ninth Congress, First Session, on S. 290 and the Relationship between the Constitutional Rights of a Free Press and the Constitutional Guarantees of an Impartial Trial (Aug. 17–20, 1965). See discussion *infra* pp. 34–35.

[5] 384 U.S. 333 (1966), discussed *infra* pp. 13–14.

[6] *Kaufman Report*, p. 395.

[7] 384 U.S. at 363.

[8] American Bar Ass'n Advisory Committee on Fair Trial and Free Press, *Standards Relating to Fair Trial and Free Press, Tentative Draft* (New York, 1966). See discussion of Approved Draft *infra* pp. 35–43.

[9] American Newspaper Publishers Ass'n, *Free Press and Fair Trial* (New York, 1967). See discussion *infra* p. 45.

[10] Association of the Bar of the City of New York, Special Committee on Radio, Television, and the Administration of Justice, *Freedom of the Press and Fair Trial* (New York, 1967). See discussion *infra* pp. 43–44.

[11] *Kaufman Report*. See discussion *infra* pp. 44–45.

Amendment guarantees. At other times they have attempted to stop the news at its source, either by prohibiting public statements by trial participants or by closing judicial proceedings to the press and public. And sometimes they have taken the form of direct restraints on the press, forbidding the publication of specified categories of information. These orders have not been limited to criminal cases, which directly implicate the Sixth Amendment right to a fair trial, but have extended to civil cases, where jury prejudice would violate the due process guarantees of the Fifth and Fourteenth Amendments.

Since most orders restricting publication of or access to information regarding judicial proceedings are not officially reported, their exact number is impossible to ascertain. A trend, however, is shown in a study done by the Reporters Committee for Freedom of the Press. This committee compiled all reported and unreported orders they were able to find. They listed none before 1966, 2 in 1966, 5 in 1967, 13 in 1968, 6 in 1969, 8 in 1970, 14 in 1971, 10 in 1972, 19 in 1973, 47 in 1974, and 63 in 1975.[12] Even more significant is that approximately eighty of the ninety-four United States District Courts now have permanent restrictive orders applicable to all criminal and civil proceedings in those federal courts.[13]

Two recent judicial proceedings have once more sharply focused the spotlight of public attention on the fair trial-free expression controversy. In California, the federal trial of Patricia Hearst was marked by widespread publicity, secret selection of jurors, and daily press conferences by defense counsel. In Nebraska a trial judge imposed sweeping restraints on publication of information regarding a sensational murder trial. The press appealed to the Supreme Court, where Mr. Justice Blackmun, in an in chambers opinion, granted a partial stay of the order.[14]

B. SCOPE OF THIS REPORT

This report is intended to provide the Subcommittee on Constitutional Rights of the Senate Judiciary Committee with an introduction to the fair trial-free expression issue, and to aid the Subcommittee in determining whether hearings or legislation in that area would be useful. We consider problems arising from direct restraints on the press, restraints on release of information to the press, and restrictions on access to judicial proceedings and judicial information. Particular emphasis is placed upon the implications of constitutional law and theory for various possible solutions to the fair trial-free expression problem.[15]

Because of the variety of laws, rules, and experiences of different states with regard to fair trial-free expression, the doubtful constitutional validity of federal legislation prescribing procedures for the state courts, and the breadth of this topic, research has been limited to problems arising in the federal courts, the decisions of federal

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[12] Jack C. Landau, "Fair Trial and Free Press: A Due Process Proposal—The Challenge of the Communications Media," 62 *A.B.A.J.* 55, 57 (1976).

[13] *Chicago Council of Lawyers* v. *Bauer*, 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 96 S. Ct. 3201 (1976).

[14] After the writing of this report, the Supreme Court handed down its decision in *Nebraska Press Ass'n* v. *Stuart*, 96 S. Ct. 2791 (1976). See Addendum, *infra* p. 81.

[15] We have not undertaken to survey the empirical studies regarding the effectiveness of traditional methods for insuring jury impartiality, nor to consider the unique problems raised by special grand jury investigations.

courts of appeal, and the reports of major national organizations. The cut-off date for most of this research was March 1, 1976, but some portions of the report have been more recently updated.

Part II contains an analysis of the relevant law as established by the Supreme Court and the federal circuit courts of appeal. Part III summarizes proposed legislation and major reports on the subject. Part IV concludes the report with commentary and recommendations.

C. CONSTITUTIONAL AND STATUTORY PROVISIONS

Freedom of speech and press: The First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Public Trial by an Impartial Jury: The Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Due Process: The Fifth Amendment

No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

Due Process and the States: The Fourteenth Amendment

No state shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

The Criminal Contempt Power in Federal Courts: 18 U.S.C. § 401

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule decree or command.

II. The State of the Law

A. SUBSTANTIVE VALIDITY OF ORDERS

1. Direct Restraints on Publishing

Federal court decisions bearing on the fair trial-free expression issue fall naturally into four groups. In the first group are four cases in which the Supreme Court reversed convictions for contempt by publication, focusing on the degree of First Amendment protection to be accorded expression regarding the courts and pending litigation. In the second are cases dealing with prior restraints on the press. In the

third are cases in which the Court dealt with claims that prejudicial publicity had deprived a defendant of a fair trial. Finally, in the fourth are very recent Supreme Court dicta and Court of Appeals decisions which are now beginning to synthesize the three earlier lines of cases and to provide some indication of how the potential fair trial-free expression conflict is to be avoided or resolved. As this report is written, the Supreme Court has heard arguments in *Nebraska Press Association* v. *Stuart*, No. 75–817; its decision should give important guidance on some of the issues discussed in this report.[1]

a. First Amendment Protection from Contempt by Publication: The Clear and Present Danger Cases

The contempt cases [1a] established the general principle that the contempt power could be used to curtail free expression outside the courtroom only if it could be shown that such expression presented a "clear and present danger" to the administration of justice. *Craig* v. *Harney*, 331 U.S. 367, 372 (1947). In examining the scope of this principle, it is important to note that in each of these cases:

(1) The petitioner had been convicted of criminal contempt because he had published articles or editorials which the trial court had found might prejudice pending litigation.

(2) The lower court had found the publications contemptuous on the ground they had a tendency to cause disrespect for the court or to prejudice the decision of a judge or grand jury; none of the cases involved a jury trial.

(3) The alleged contemner had not been a party to the litigation commented upon.[2]

(4) The publication had been preceded by neither legislation nor a court order specifying what comment might be considered contemptuous.

In *Bridges* v. *California*, 314 U.S. 252 (1941), while a new trial motion was pending in a dispute between two unions, an officer of one of the unions issued a statement calling the judge's decision in the case outrageous and threatening a strike if it were enforced. In *Times-Mirror Co.* v. *Superior Court*, considered jointly with *Bridges*, a newspaper had been convicted of contempt for publishing three editorials. Of these, the one which the lower court had found most offensive denounced two men convicted of assault and stated that the judge would make a grave mistake if he granted probation to either of them. In both *Bridges* and *Times-Mirror*, the Supreme Court reversed the convictions, holding that neither a "reasonable" nor an "inherent" tendency to interfere with the administration of justice was sufficient to justify a restriction of free expression. The Court required instead that a "clear and present danger" of such interference be demonstrated, emphasizing that before freedom of expression can be abridged "the substantive evil must be extremely serious and the degree of imminence extremely high." 314 U.S. at 263.

In *Pennekamp* v. *Florida*, 328 U.S. 331 (1946), the Court reversed a contempt citation entered against a newspaper and its editor for

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[1] For the Court's decision, see Addendum, *infra* p. 81.

[1a] *Wood* v. *Georgia*, 370 U.S. 375 (1962); *Craig* v. *Harney*, 331 U.S. 367 (1947); *Pennekamp* v. *Florida*, 328 U.S. 331 (1946); *Bridges* v. *California*, 314 U.S. 252 (1941).

[2] *Bridges* had involved a dispute between two unions. The alleged contemner, though not a party, was an officer of one of those unions.

critically and inaccurately reporting court proceedings—including pending cases—and for suggesting that the judges involved were biased toward criminals. The Court rejected the Florida Supreme Court's justification that the articles reflected upon the integrity of the court and tended to prejudice the judges, holding instead that such criticism in "pending non-jury proceedings could not directly affect" the orderly administration of justice and hence did not pose a "clear and present danger."

One year later, in *Craig* v. *Harney*, 331 U.S. 367 (1947), the Supreme Court reversed a conviction for publishing articles and an editorial unfairly reporting a case in which a new trial motion was pending. The Court concluded, 331 U.S. at 374:

> A trial is a public event. What transpires in the courtroom is public property. If a transcript of the court proceedings had been published, we suppose none would claim that the judge could punish the publisher for contempt . . . Those who see and hear what transpired can report it with impunity. There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government to suppress, edit, or censor events which transpire in proceedings before it.

The Court recognized there might conceivably be some situations which would pose a "clear and present danger" sufficient to justify curtailment of free expression. Before such a situation might be found, however, "[t]he fires which [the expression] kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil." 331 U.S. at 376.

The "clear and present danger" test was reaffirmed in *Wood* v. *Georgia*, 370 U.S. 375 (1962), as the Court reversed the conviction of a sheriff who had issued extrajudicial statements to the press and grand jury criticizing the grand jury's investigation into bloc voting patterns by blacks. The Court held that, at least when a grand jury is performing an investigation into a general problem area and is not concentrating on indicting a particular individual, there is no evidence of a "clear and present danger" to the administration of justice "in the absence of any showing of actual interference with the undertakings of the grand jury." The argument that Wood's position as an officer of the court justified restricting his freedom of expression was expressly rejected with the comment that his statements in no way interfered with his official duties. 370 U.S. at 393–94.

While this decision differed from those preceding it in that it involved a grand jury of laymen rather than a judge, the Court was careful to point out that it was not deciding upon standards to be applied in a jury trial situation.

> [T]his case does not represent a situation where an individual is on trial . . . Moreover, we need not pause here to consider the variant factors that would be present in a case involving a petit jury. Neither *Bridges, Pennekamp* nor *Harney* involved a trial by jury. In *Bridges* it was noted that "trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper" (314 U.S., at 271), and of course the limitations on free speech assume a different proportion when expression is directed toward a trial as compared to a grand jury investigation. [370 U.S. at 389–90]

More recent cases indicate that, in other areas of the First Amendment, the Court has moved away from explicit reliance on the "clear and present danger" standard, in line with its current inclination to resolve difficult constitutional questions by balancing compet-

ing interests.[3] However, this report continues to refer to the standard for two reasons.

First, "clear and present danger" has a much more concrete meaning when limited to the context of fair trial-free expression cases than when used as a general standard for the First Amendment. In other cases, we are left to wonder "clear and present danger of what?" We are told that the threat of harm must be imminent rather than likely, but we are not told how serious the threatened harm must be. Formulas which require weighing "the gravity of the 'evil,' discounted by its improbability" against the invasion of free speech (*Dennis* v. *United States*, 341 U.S. 494, 510 (1951)) raise more questions than they answer. Moreover the very notion of permitting restraints on a showing of "clear and present danger" has been criticized as permitting the stifling of speech as soon as it threatens to become effective.[4]

In the fair trial-free expression context, on the other hand, we know exactly what "evil" must be imminent: the evil of an unfair trial. While one could calibrate the seriousness of the evil in terms of how much prejudice would result, the clear and present danger standard at least places a bottom line on judicial restrictions: they are to be permitted only when there is an imminent threat of significant prejudice. Similarly, when applied to fair trial-free expression rather than subversive activities cases, the standard does not permit stifling speech as soon as it threatens to become effective; after all, few have justified extrajudicial statements in the fair trial context on the ground that they have a legitimate interest in prejudicing a jury. The expression may be fully effective in promoting public scrutiny of the judicial process, in erasing the public stigma of a criminal indictment, or in explaining the political significance of a trial, without providing any justification for judicial restriction.

The other reason for referring to the "clear and present danger" standard is that it is a reasonably accurate expression of the level of necessity which must be shown before the Court will sustain judicial restrictive orders. While the standard may itself be derived from a sort of balancing analysis, simply to talk about balancing tells us little about the weights the Court has already attached to the values of free expression and fair trial. Whether the Court continues to rely explicitly on the clear and present danger phrase or simply balances competing interests, it probably will continue to prohibit restrictions on publication unless an imminent and serious threat to the fairness of a trial is shown.

With this in view, the cases discussed in this section (*Bridges*, *Pennekamp*, *Craig*, and *Wood*) establish that in the absence of a prior proscriptive order of the court the contempt power may not be used to punish expression regarding pending litigation unless that expression poses a clear and present danger to the administration of justice. They also indicate that this standard will generally preclude punishment for comment relating to a non-jury case. But two important questions remain unanswered:

(1) Do the principles enunciated in *Bridges*, *Pennekamp*, *Craig*, and *Wood* apply with equal force to judicial orders constituting a

[3] *See, e.g., Procunier* v. *Martinez*, 416 U.S. 396 (1974); *Healy* v. *James*, 408 U.S. 169 (1972).

[4] *See, e.g., Dennis* v. *United States*, 341 U.S. 494, 580 (1951) (Black, J., dissenting).

prior restraint on speech? This question has particular significance since the federal courts cannot use the contempt power to punish conduct occurring outside the presence of the court except when that conduct is in violation of a court order. 18 U.S.C.A. § 401; *Nye* v. *United States*, 313 U.S. 33, 47–48 (1941) (interpreting the predecessor of Section 401, 18 U.S.C. § 241).

(2) Is the clear and present danger standard equally applicable to cases involving trial by jury? There is little indication of the circumstances under which comment might be found to create such a danger in a jury case.

b. Prior Restraints on Expression

For many years the Supreme Court embraced the Blackstonian view that the First Amendment was intended solely to protect against the imposition of restraints before expression took place—not against subsequent punishment for expression. *See*, *e.g.*, *Patterson* v. *Colorado*, 205 U.S. 454 (1907). With the turn of the century, the Court began to recognize that freedom of expression guaranteed more than immunity from previous restraints or censorship, but continued to maintain that preventing such restraints was its most important function. *Near* v. *Minnesota*, 283 U.S. 697 (1931); *Schenck* v. *United States*, 249 U.S. 47 (1919).

In more recent years, the Court has consistently held that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 558 (1975); *New York Times Co.* v. *United States*, 403 U.S. 713, 714 (1971); *Carroll* v. *President and Commissioners of Princess Anne*, 393 U.S. 175, 181 (1968); *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70 (1963). The government "thus carries a heavy burden of showing justification for the imposition of such a restraint." *New York Times Co.* v. *United States*, 403 U.S. 713, 714 (1971); *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 419 (1971).

The Court's decision in the Pentagon Papers case, *New York Times Co.* v. *United States*, 403 U.S. 713 (1971), provides some indication of the difficulty of rebutting the presumption of invalidity. There the Court overturned a prior restraint on publication despite the facts that the papers were classified "Top Secret—Sensitive," that they were surreptitiously copied, that a majority of the Court (though not a majority of those voting to overturn) indicated publication would be harmful to the nation, and that a majority of the Court indicated publication might be sufficient grounds to sustain a conviction for violation of the Espionage Act.[5]

While reasonable restrictions on the time, place, and manner of expression have been permitted, *e.g.*, where necessary to prevent interference with traffic and overlapping use by other would-be speakers,[6] where there were captive audiences,[7] where a forum was intended to serve a competing use,[8] or where necessary to prevent disturbances by loudspeakers,[9] judicial restrictive orders do not fall within the ambit

[5] Brief for Petitioners at 48, *Nebraska Press Association* v. *Stuart*, *supra*.
[6] *See*, *e.g.*, *Cox* v. *New Hampshire*, 312 U.S. 569 (1941).
[7] *See*, *e.g.*, *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974).
[8] *See e.g.*, *Adderley* v. *Florida*, 385 U.S. 39 (1966).
[9] *Kovacs* v. *Cooper*, 336 U.S. 77 (1949).

of this exception. It is true that they generally remain in effect only for the duration of a trial. But they restrict speech on the basis of its content and over an extended period of time and thus bear only a linguistic similarity to the situations the time, place, and manner exception is intended to encompass.

The burden of justifying a prior restraint falling outside the "time, place, and manner" qualification is so heavy that it has never been met in any case which has come before the Supreme Court. Dicta have indicated only a very narrow class of cases in which it might conceivably be met: When the nation "is at war," *Schenck* v. *United States*, 249 U.S. 47, 52 (1919), "no one would question that but the government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops." *Near* v. *Minnesota*, 283 U.S. 697, 716 (1931). See *New York Times Co.* v. *United States*, 403 U.S. 726 (1971) (Brennan, J., concurring).

Fair trial-free expression cases do not fall within the narrow list of instances which the Court has indicated might be sufficient to justify prior restraints, and one can only speculate whether the Court might be willing to create another special exception to cover cases where the impartiality of a jury was threatened. The Tenth Circuit has gone so far as to argue that prior restraints in the fair trial-free expression context are preferred over subsequent restraints because they provide more specific notice of proscribed conduct.[10] This argument seems to misread consistent Supreme Court precedents and misconstrue the vital policy which gave rise to those precedents. As the Court emphasized in 1975:

> The presumption against prior restraints is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable.[11]

The plain message to be taken from these cases is that if prior restraints on speech to safeguard a fair trial are ever permitted, they will be permitted only upon a showing of a threat even more evident and more imminent than that required in the "contempt by publication" cases.

c. The Fair Jury Trial Cases

The Supreme Court's early fair trial-free expression decisions came, as noted, in cases where people had been held in contempt for publishing information allegedly prejudicial to proceedings before a judge or grand jury. In more recent decisions, the focus has shifted to jury verdicts challenged on the ground that prejudicial publicity had deprived the defendant of the right to a fair trial. Arguably there might be similar cases—cases which would never reach an appellate tribunal because of the defendant's constitutional protection against double jeopardy—where the state was deprived of its "fair trial rights" by a jury prejudiced in favor of the defendant. The constitutional status of the state's right is unclear. But if such a right exists, the circum-

[10] *United States* v. *Tijerina*, 412 F. 2d 661 (10th Cir.), *cert. denied*, 396 U.S. 990 (1969).
[11] *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 558–59 (1975).

stances required before the law would say the state's right had been violated would be at least as stringent as those required of a similar claim by a defendant.

Understanding the circumstances under which the Court has held that prejudicial publicity has deprived a defendant of the right to an impartial jury is therefore fundamental to this study. For it is primarily under those circumstances that there may be a substantial conflict between the rights of fair trial and free press.

In *Marshall* v. *United States*, 360 U.S. 310 (1959), the defendant was convicted of dispensing drugs without a prescription. During the trial, seven jurors were exposed to newspaper stories reporting that the defendant had previously been convicted of forgery, that he and his wife had been arrested for other narcotics offenses, and that he had practiced medicine without a license. This information had been held inadmissible by the trial court because its probative value was very low and its prejudicial effect likely to be high. All seven jurors told the judge that they would not be influenced by the news articles, and the judge refused to grant a mistrial. In a per curiam opinion, the Supreme Court reversed the conviction but chose to rely on its "supervisory power to formulate standards for enforcement of the criminal law in the federal courts" rather than the fair trial requirements of the Sixth Amendment. The principle behind the decision, applicable only in federal courts, was "that persons who have learned from news sources of a defendant's prior criminal record are presumed to be prejudiced." [As summarized in *Murphy* v. *Florida*, 421 U.S. 794, 798 (1975).]

Two years after *Marshall*, the Court confronted the constitutional dimensions of juror bias. In *Irvin* v. *Dowd*, 366 U.S. 717 (1961), it vacated and remanded a murder conviction where despite a "pattern of deep and bitter prejudice" which had been "shown to be present throughout the community," 366 U.S. at 727, a second change of venue had been prohibited by state law.

The Court recognized that it is often impossible to assure that none of the jurors have preconceived notions regarding guilt or innocence, 366 U.S. at 722–23:

> It is not required . . . that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. [Citations omitted.]

The Court went on to rule that the test was "whether the nature and strength of the opinion formed are such as in the law necessarily . . . raise the presumption of partiality," and that it was the duty of the appellate court "to independently evaluate the *voir dire* testimony of the impaneled jurors." 366 U.S. at 723. Applying this standard to a situation where adverse publicity had permeated the small town in which the trial took place and where ninety percent of the 370 prospective jurors and two-thirds of those actually seated on the jury believed the defendant was guilty, the Court held that where so many

had admitted prejudice the jurors' assurances of impartiality could be given little weight. 366 U.S. at 728.

The following year, Teamster President Dave Beck asked the Court to reverse his embezzlement conviction on the ground that, regardless of the jurors' testimony to the contrary, the publicity surrounding the trial had inherently prevented the selection of an impartial jury. The decision affirming Beck's conviction, *Beck* v. *Washington*, 369 U.S. 541 (1962), helped to clarify both the limits and the heavily factual orientation of the *Irwin* principles. Noting that the intensity of the adverse publicity had greatly diminished by the time of the trial, that few of those examined on *voir dire* had admitted any opinion as to the defendant's guilt, and that all of those who had admitted holding an opinion on the subject had been dismissed, the Court ruled: "We cannot say the pretrial publicity was so intensive and extensive or the examination of the entire panel revealed such prejudice that a court could not believe the answers of the jurors. . . ." 369 U.S. at 557.

Rideau v. *Louisiana*, 373 U.S. 723 (1963), involved a fact situation similiar to that of *Irvin* v. *Dowd*. A twenty-minute television film of the defendant's confession had been made with the active cooperation of law enforcement officials. A change of venue had been denied despite the repeated local broadcasting of the film in which the defendant, unassisted by counsel, had confessed to robbery, kidnapping, and murder. The decision reversing the conviction went beyond *Irvin* to hold, "without pausing to examine a particularized transcript of the *voir dire* examination," that such a situation was inherently prejudicial and that the refusal to grant a change of venue constituted reversible error. 373 U.S. at 727.

In the recent case of *Murphy* v. *Florida*, 421 U.S. 794 (1975), the Court further clarified the burden which must be met before a conviction will be set aside because of prejudicial publicity and reemphasized that total ignorance of the case was not required of prospective jurors. Seven months before the trial, numerous newspaper articles had reported Murphy's conviction for murder and his guilty plea to a federal indictment involving stolen securities. Some of the jurors had a vague recollection of the robbery with which he was charged in the instant case, and each had some knowledge of his past crimes. The Court explicitly rejected Murphy's claim that the *Marshall* principle (creating a presumption of prejudice whenever jurors have learned of a defendant's prior criminal record) was applicable to state courts and emphasized that the principle had never been accorded the status of a constitutional requirement. 421 U.S. at 798. The Court held that, given assurances by the jurors that they could be impartial and in the absence of a "sufficiently inflammatory" atmosphere in the community, 421 U.S. at 802, a state court's finding that its jury was impartial would not be reversed unless the defendant could demonstrate "the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality," 421 U.S. at 800.

The facts of *Murphy* did not produce an explanation of the current status of the *Marshall* principle in the federal courts. But the Court's holding that it could not "conclude, in the circumstances presented in this case, that petitioner did not receive a fair trial," 421 U.S. at 803,

together with the holding in *Beck* and the language in *Irvin* acknowledging the near impossibility of finding jurors who will not have formed some opinion as to the merits of the case, leave *Marshall's* viability in doubt. More important, the refusal to elevate the *Marshall* rule to constitutional status means that restrictions on free expression cannot be justified simply by showing that publication will make it impossible to impanel a jury which has not been exposed to some prejudicial information. A vital constitutional right must weigh very heavily against a doctrine having no constitutional sanction.

Murphy, *Rideau*, *Beck*, and *Irvin* tell us a good deal about the circumstances in which the rights of a free press may arguably conflict with the right to a fair trial before an impartial jury. In none of these cases, however, did the Court discuss the need to prevent prejudicial publicity. Rather, it focused on the trial judge's responsibility to grant a change of venue when prejudicial publicity had occurred prior to the trial, or to grant a mistrial if the jurors were exposed to highly prejudicial information after the trial began.

Estes v. *Texas*, 381 U.S. 532 (1965), and *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966), on the other hand, emphasized the duty to prevent prejudicial publicity from reaching the jurors and to insure that reporters in the courtroom do not disrupt the decorum of the trial. While dealing primarily with the right to a fair trial rather than the rights of a free press, these decisions give us a better indication of how conflict between these two principles is to be avoided.

In *Estes*, a divided Court reversed a conviction for swindling, holding that the televising of a "heavily publicized and highly sensational" trial inherently infringed the defendant's right to a fair trial. 381 U.S. 532, 590–91 (Harlan, J., concurring). Justice Clark's plurality opinion, joined by three other members of the Court, would bar television not only from sensational trials but from all trials.

In explaining his view that televising of such proceedings was always inherently prejudicial, Justice Clark emphasized the consciousness of the jurors, witnesses, and judge that the trial was being telecast and the possibility that jurors and witnesses would be influenced by viewing reports of testimony. 381 U.S. at 545–49. He discounted the relative unobtrusiveness of the cameras at the trial, pointing out that these distractions were not caused solely "by the physical presence of the camera." 381 U.S. at 546.

Since the problems referred to are also present to a lesser extent in any published report of a trial, one might assume that the difference between print and television would be only a matter of degree and that if television may be barred in any notorious trial other forms of reporting might be barred in some circumstances. Yet elsewhere in the opinion, Clark made clear that it was only the presence of the cameras in the courtroom which was to be barred—not the reporting itself.

> It is true that the public has the right to be informed as to what occurs in its courts, but reporters of all media, including television, are always present if they wish to be and are plainly free to report whatever occurs in open court through their respective media. This was settled in *Bridges* v. *California* . . . and *Pennekamp* v. *Florida* . . ., which we reaffirm. [381 U.S. at 541–42.]

The three members of the Court who joined Justice Clark in that opinion similarly agreed in a separate concurrence:

> So long as the television industry, like the other communications media, is free to send representatives to trials and to report on those trials to its viewers, there is no abridgement of the freedom of the press. [381 U.S. at 585.]

In *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966), the Supreme Court reversed a murder conviction on the ground that the trial judge had not fulfilled his duty to control disruptive influences in the courtroom and to protect the defendant from the effects of prejudicial publicity which had saturated the community. Although there had been massive, extremely prejudicial pretrial publicity and all but one of the jurors had read about the case in the newspapers, a trial judge in the midst of his own campaign for reelection had denied motions for continuance and change of venue. 384 U.S. at 345, 348, 354. The jurors had not been sequestered, had not been given adequate instructions concerning their obligation not to read or listen to extrajudicial reports about the case, and in fact had been "thrust into the role of celebrities by the judge's failure to insulate them from reporters and photographers." The judge had allowed reporters to take over practically the entire courtroom, and "bedlam reigned at the courthouse during the trial," 384 U.S. at 353, 355. In considering the action the trial judge should have taken to safeguard the rights of the defendant, the Supreme Court emphasized the important role of the press in the judicial process, 384 U.S. at 349–51:

> The principle that justice cannot survive behind walls of silence has long been reflected in the "Anglo-American distrust for secret trials." *In re Oliver*, 333 U.S. 257, 268 (1948). A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. . . . The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism. This Court has, therefore, been unwilling to place any direct limitations on the freedom traditionally exercised by the news media for "[w]hat transpires in the court room is public property [citing *Craig* v. *Harney*] . . . .
>
> But [freedom of the press] must not be allowed to divert the trial from the "very purpose of a court system . . . to adjudicate controversies . . . in the calmness and solemnity of the courtroom according to legal procedures. [citation omitted.] Among these "legal procedures" is the requirement that the jury's verdict be based on evidence received in open court, not from outside sources.

The Court ruled that, given the massive publicity, the judge should have: (1) adopted stricter rules governing the use of the courtroom by newsmen, (2) insulated the witnesses, (3) made "some effort to control the release of leads, information, and gossip to the press by police officers, witnesses, and the counsel for both sides," and (4) raised the possibility of sequestering the jury. 384 U.S. at 358–59, 363. In addition, wherever "there is a *reasonable likelihood* that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county . . ." 384 U.S. at 363 (emphasis added). Moreover, the Court suggested, reporters "who wrote or broadcast prejudicial stories, could have been warned as to the *impropriety* of publishing material not introduced in the proceedings." 384 U.S. at 362 (emphasis added).

There has been much conjecture as to what Mr. Justice Clark meant by this last suggestion.[12] Earlier in the opinion, the Court had said that since it concluded the traditional methods of guarding against prejudicial publicity would have been sufficient to guarantee Sheppard a fair trial, it would not "consider what sanctions might be available against a recalcitrant press." 384 U.S. at 358. In this context, the suggestion appears to have contemplated nothing more than advice to the press as to the problems which publication of material not introduced into the proceedings could create. This interpretation is consistent with the Court's express reaffirmation of the rights of the press later in the opinion: "Of course, there is nothing that proscribes the press from reporting events which transpire in the courtroom," 384 U.S. at 362–63.

Summary: The Fair Jury Trial Cases.—The fair trial cases establish that the mere fact that jurors have heard something about a case prior to trial will not create a presumption of prejudice. If the jurors state that they will be able to render a fair and impartial verdict on the evidence, a conviction will not generally be set aside unless (1) actual prejudice can be shown (as in *Irvin*), or (2) the publicity has been so highly prejudicial, or so massive or pervasive (as in *Rideau*, *Sheppard*, and *Estes*) that prejudice must be presumed.

In each of the cases reversed (with the exception of the apparently discredited *Marshall* case), the trial court had either denied a change of venue and/or, as in *Estes* and *Sheppard*, had actively cooperated in efforts which would obviously increase prejudicial publicity. While the effect of prejudice on the defendant is the same whether it has occurred because of the judge's failure to take simple precautions or despite the judge's strenuous but unsuccessful prophylactic efforts, one senses that the Supreme Court was reversing partly as a sanction against judicial negligence. Thus *Sheppard* announced that a continuance or change of venue was to be granted whenever there was a "reasonable likelihood" that a fair trial would otherwise be prevented. *Murphy*, on the other hand, could be read as an indication that where the judge has conscientiously attempted to prevent unnecessary prejudice the Court will be slow to throw out a conviction.

Only *Sheppard* and *Estes* give us much indication as to what affirmative steps, beyond barring television from the courtroom and granting a change of venue or a continuance, a trial court may be expected to take to insure a fair trial.

Estes, while prohibiting the presence of television *equipment* in the courtroom, made clear that it proposed no restraint on television *reporting*. *Sheppard's* dicta go beyond *Estes* explicitly to disapprove any direct restraint on reporting of events transpiring *in open court*. More important than the Court's language, however, is its approach to the problem. In recommending so many alternatives to prevent prejudice without finding any need to consider imposing any direct restraints on reporting—whether of events transpiring in or out of the courtroom—the *Sheppard* Court implicitly followed the rule that all other possible means must be utilized before any direct restraints will even be contemplated. This is consistent with the Court's doctrine in other First Amendment cases that curtailment of free expres-

[12] *See e.g.*, Donald M. Gillmoor, *Judicial Restraints on the Press* (Freedom of Information Foundation, 1974).

sion can be justified only when it is the least drastic means available to secure a compelling state interest. See *Carroll* v. *President & Commissioners of Princess Anne*, 393 U.S. 175, 183 (1968); *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960).

Above all, when faced with a trial involving extraordinary publicity and sensationalism, the Court found that other means of preventing prejudicial publicity would have sufficed and recommended no direct restraints on reporting whatsoever. If such restraints were not necessary in the Sheppard trial, it is difficult to foresee any situation which would require or justify them.

d. Recent Indications of Judicial Opinion Regarding Direct Restraints

A review of recent Supreme Court and federal court of appeals decisions reveals only two suggestions that direct restraints on the press may be an appropriate way of dealing with the problem of prejudicial publicity. Both suggestions are contained in dicta.

In *Branzburg* v. *Hayes*, 408 U.S. 665 (1972) (5–4), dealing with whether journalists could be required to disclose confidential sources, the plurality opinion pointed out in passing that journalists "may be prohibited from attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial before an impartial tribunal." 408 U.S. at 685.

In context, however, this may be a misleading attempt to restate prior holdings. An appellate judge commented:

> It seems unlikely that [Justice White] . . . meant for this dictum to be read too literally since he immediately cites *Sheppard, Estes* and *Rideau* as support for this proposition. . . . [E]ach of these cases expressly and explicitly disavows any suggestion that newsmen can be prohibited from publishing reports of what transpires in open court.

United States v. *Dickinson*, 465 F. 2d 496, 507 n.14 (5th Cir. 1972), *cert. denied*, 414 U.S. 979 (1973).

Moreover, "[t]here was no indication [in the *Branzburg* opinion] . . . that the standards for determining the propriety of resort to such action would materially differ from those applied in other decisions involving prior restraints of speech and publication." Powell, J., as Circuit Justice, *Times-Picayune Publishing Corp.* v. *Schulingkamp*, *stay granted*, 419 U.S. 1301, 1307 (1974), *appeal dismissed as moot*, 420 U.S. 985 (1975).

More recently, the Federal Court of Appeals for the Third Circuit, relying on the *Branzburg* dicta and on language in *Sheppard* permitting restrictions on parties, lawyers, jurors, witnesses, and court officials, assumed, without deciding, that a trial court had the power to prohibit non-parties from publishing information which would imperil the defendant's right to a fair trial. The Court did not indicate its view of the circumstances which must be shown before such a restriction would be permissible. *United States* v. *Schiavo*, 504 F.2d 1 (3rd Cir.), *cert. denied*, 419 U.S. 1096 (1974).

Leaving these ambiguous dicta aside, federal and state appellate courts have generally held that court orders directly imposing restraints on the press are unconstitutional. In *United States* v. *Dickinson*, 465 F.2d 496 (5th Cir. 1972), *cert. denied*, 414 U.S. 979 (1973), the only Federal Court of Appeals decision on point, the Fifth Cir-

cuit declared that "a blanket ban on publication of court proceedings so far transgresses First Amendment freedoms that [it] . . . 'cannot withstand the mildest breeze emanating from the Constitution.'" 465 F.2d at 500. Elsewhere in the opinion, the Court seemed to qualify this holding slightly, saying that even if "—and that *if* is a very big one indeed—" curtailment of the right to publish court proceedings might be justified in some extraordinary circumstances, the present case did not present such circumstances. 465 F.2d at 507.

The Court noted that although the case had been well publicized and future jury proceedings were likely, the proceeding to which the ban applied was a non-jury matter where trial on the merits would not follow immediately, that there was no "carnival" atmosphere, and that there were "available alternative cures for prejudicial publicity far less disruptive of constitutional freedoms than an absolute ban on publication." 465 F.2d at 507–08. Despite this qualification, the *Dickinson* opinion gave fair warning that the Court was unlikely to uphold any such order in any future case, 465 F.2d at 506, 507:

> Censorship in any form—judicial censorship included—is simly incompatible with the dictates of the Constitution and the concept of a free press. . . . [N]o decision, opinion, report or other authoritative proposal has ever sanctioned by holding, hint, dictum, recommendation or otherwise any judicial prohibition of the right of the press to publish accurately reports of proceedings which transpire in open court.

Though a reading of the *Dickinson* opinion leaves a strong feeling that the Fifth Circuit would forcefully reverse any attempt to impose restraints on reporting of trial-related events occurring out of court, that issue was neither posed in the case nor dealt with in the decision. In four recent cases where it has been posed before state appellate courts, however, they have uniformly held the restraints unconstitutional. *Oliver* v. *Postel*, 30 N.Y. 2d 171, 331 N.Y.S. 2d 407, 282 N.E. 2d 306 (1972); *State* v. *Sperry*, 79 Wash. 2d 69, 483 P.2d 608, *cert. denied*, 404 U.S. 939 (1971); *Atlanta Newspapers, Inc.* v. *State*, 216 Ga. 399, 116 S.E. 2d 580 (1960); *Worcester Telegram & Gazette, Inc.* v. *Commonwealth*, 354 Mass. 578, 238 N.E. 2d 861 (1968).

e. Summary: Validity of Direct Restraints on the Press

The early Supreme Court decisions established that the contempt power could be used to punish publication only in the face of a clear and present danger to the administration of justice. Despite waning use of the clear and present danger standard in other First Amendment areas, it seems to have continued vitality in fair trial-free expression cases.

Restraints on expression imposed by court order must withstand not only the clear and present danger standard, but also the heavy presumption against the constitutional validity of prior restraints. If a threat to the fairness of a trial can ever be sufficient to lift the heavy burden of justification which attaches to all prior restraints, it must be a threat even more evident, even more serious, and even more imminent than that required in the subsequent restraint cases.

The clear and present danger standard will generally preclude punishment for contempt by publication in non-jury trials. It follows, a fortiori, that prior restraints on publication in such trials would be unconstitutional. A more difficult question is posed, however, when a

case is to be decided not by a judge trained to disregard inadmissible evidence, but by a lay jury.

The answer to this question requires an understanding of the circumstances in which the Court has held that prejudicial publicity deprived a defendant of an impartial trial. It is under such circumstances that the potential for conflict between the rights of fair trial and free press is greatest.

A court clearly has an obligation to take steps to insure that the defendant receives a fair trial by an impartial tribunal protected from the effects of prejudicial publicity. A change of venue or a continuance, for example, should be granted whenever there is a reasonable likelihood that prejudice will otherwise prevent a fair trial.

The right to a fair trial, however, is not a right to a panel of jurors who have never been exposed to any prejudicial information regarding the defendant. Unless actual bias is demonstrated, or unless publicity has been so highly prejudicial and so massive as to pervade the entire community, the jurors' affirmations of impartiality may be believed by the trial court.

Whether the court uses the "clear and present danger" test or another of its First Amendment standards, curtailment of freedom of expression will apparently be permitted only where it is the least drastic means available to secure a fair trial. Yet there has never been a case in which the Supreme Court has reversed a conviction because of the failure of the trial judge to impose direct restraints on the press or even suggested with regard to a concrete factual situation that such restraints would be appropriate. Though there have recently been general suggestions to that effect in the dicta of the Supreme Court's plurality *Branzburg* opinion, and the Third Circuit's *Schiavo* opinion, neither of those cases indicated that the standard for determining the permissibility of the restraints would be any less demanding than that required by earlier decisions. They seemed to indicate only the theoretical possibility that there might conceivably be a situation which would meet that standard.

The *Sheppard* and *Estes* opinions, like the early case of *Craig* v. *Harney*, declare explicitly that the press has a right to report what transpires in open court. Moreover, these cases indicate that even in the most sensational cases imaginable, other means of controlling publicity will be sufficient, and direct restraints on the press will not be justified.

As this report is written, the Supreme Court is considering the case of *Nebraska Press Association* v. *Stuart*, in which members of the press have challenged direct restraints imposed in a highly sensational jury trial for murder. The Court's decision in that case should supply some definitive answers to questions regarding direct restraints on the press.[13]

2. Restraints on Trial Participants

Faced with the difficult constitutional problems inherent in any direct attempt to impose a prior restraint on the press, many courts have sought to prevent prejudicial publicity through orders prohibiting comment on pending cases by counsel, parties, or witnesses. These

[13] See Addendum, *infra* p. 81.

orders pose three kinds of constitutional problems. First, they may arguably be an infringement of the free speech rights of those whose comment is proscribed. Second, they may be viewed as an intentional effort to restrict the freedom of the press by stopping the news at its source. Third, they may provide a roundabout means of actually punishing the reporter for publishing. Though in express terms they proscribe only the *release* of information to the press, "the reporter may be caught in a cross-fire between the court and the source of information, when the court tries to find out which of the participants . . . violated the gag order by leaking the prohibited information to the press." [14] This is what happened in *Farr* v. *Superior Court*, 22 Cal. App. 3d 60, 99 Cal. Rptr. 342 (2d Dist.), *cert. denied*, 409 U.S. 1011 (1971). After *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), it is clear that reporters can be punished for contempt if they refuse to disclose their sources in such a situation.

a. Another Suggestion from Sheppard

The *Sheppard* opinion suggested some restraints on trial participants when it declared, 384 U.S. at 361, 363:

> The trial court might well have proscribed extra-judicial statements by any lawyer, party, witness or court official which divulged prejudicial matters, such as the refusal of Sheppard to submit to interrogation or take any lie detector tests; any statement made by Sheppard to officials; the identity of prospective witnesses or their probable testimony; any belief in guilt or innocence; or like statements concerning the merits of the case.
>
> The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.

However, the recommendation is difficult to evaluate for three reasons:

(1) The Supreme Court made so many suggestions as to things the trial court should have done differently that it is difficult to assign any particular suggestion the weight of a holding or the lesser weight of dicta. The label, of course, makes little difference in itself. But here it is unclear to what extent the Court had considered the implications and possible problems of its suggestions. Indeed none of the parties seriously pressed upon the Court the First Amendment values at stake when courts restrain the release of information to the press.[15]

(2) The Court did nothing to spell out the principle behind treating each of the specified categories of people—prosecutors, counsel for defense, the accused, witnesses, court staff, and enforcement officers—differently from anybody else.

With regard to lawyers, and perhaps to law enforcement officers, there is an implication that they may give up some of their rights because of their fiduciary relationship to the court. But the Court did not specify to what extent these rights have been forfeited. Nor are we told wherein lies the relevant distinction between the suggestion in this case and the decision in *Wood* v. *Georgia*, 370 U.S. 375 (1962), in which it was held that Wood's position as sheriff provided no basis

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[14] Joel M. Gora, *The Rights of Reporters* (New York, 1974), p. 147.

[15] Brief of Petitioner; Brief of Respondents; Briefs of Amici Curiae, *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966).

for curtailing his freedom of expression. The distinction may be that there was no evidence Wood's expression interfered with the performance of his duties. Or it may be that he had been given no special access to information regarding the pending jury investigation—but this is only conjecture.

The Court did not explain why defendants are entitled to less First Amendment protection than others. Similarly, no explanation was offered as to witnesses, who, after all, may not have volunteered to testify, or been indicted, or done anything else except find themselves embroiled in someone else's litigation. Possibly, the Court thought that the requirements of the criminal justice system were simply more likely to override the First Amendment rights of trial participants than those of nonparticipants.

(3) Unfortunately, the Court did not discuss the standard to be used in determining the propriety of silencing trial participants. Under the circumstances of the Sheppard trial, the Court could well have found a serious and imminent threat to the administration of justice; consequently, a lesser standard than the "clear and present danger" test might not have been found sufficient to warrant the suggested restrictions on release of information. Given the dangers inherent in allowing the government to silence citizens simply by making them defendants or witnesses in a criminal trial, the Court must not have intended to authorize such restrictions in every case. On the other hand, it seems to have assumed that restrictions on trial participants are at least preferable to direct restraints on the press. Beyond these vague contours, little is known about the standard of necessity which must be met to bring the Court's suggestions into play, or even whether the same standard is to be applied to different categories of trial participants (*e.g.*, lawyers, witnesses, defendants).

b. Decisions in Federal Courts of Appeal

Three federal courts of appeal have now passed on the constitutionality of restraints directed at the speech of trial participants. They have reached rather different results.

(1) *The "Reasonable Likelihood" Standard.*—In *United States* v. *Tijerina*, 412 F. 2d 661 (10th Cir.), *cert. denied*, 396 U.S. 990 (1969), the defendants had violated a pretrial order prohibiting counsel, defendants, and witnesses from making any statement regarding the jury, the merits of the case, the evidence, the witnesses, or rulings of the court. 412 F. 2d at 663. The Court relied on the *Sheppard* opinion to rule that a " '*reasonable likelihood*' of prejudicial news which would make *difficult* the impaneling of an impartial jury" was sufficient to justify the order. 412 F. 2d at 666 (emphasis added).

Moreover, the text of the order upheld demonstrates that it required only a "reasonable likelihood that prejudicial news prior to the trial would render *more* difficult the impaneling of a jury" 412 F. 2d at 663 n.1 (emphasis added). The Tenth Circuit may have been requiring only that the publicity make the impaneling of a jury *more difficult than it would otherwise be*—a condition which would presumably be met in almost any case involving a jury. The court distinguished *Bridges*, *Pennekamp*, *Craig*, and *Wood*, *supra*, on the grounds that none of those cases involved the violation of an order of the court.

But the *Tijerina* court neglects to give adequate weight to the Supreme Court's longstanding warning that any prior restraint on freedom of expression "comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70 (1963).[16] It is uncertain whether the Tenth Circuit's effort to distinguish the *Bridges* line of cases on the ground that they did not involve violation of court orders could withstand the weight of the prior restraint opinions.

Nevertheless the "reasonable likelihood" standard—at least as applied to restrictions on counsel—has received considerable support. It has been adopted in the fair trial-free expression recommendations of the American Bar Association[17] and the U.S. Judicial Conference,[18] and seems to have been accepted by the Twentieth Century Fund's fair trial-free press task force.[19] It was also relied upon to uphold restraints on counsel in *Younger* v. *Smith*, 30 Cal. App. 3d 138, 106 Cal. Rptr. 225 (2d Dist. 1973).

(2) *The "Clear and Present Danger" Standard.*—The "reasonable likelihood" standard stands in sharp contrast to that relied upon in the relevant federal courts of appeal cases handed down since *Tijerina*. The Seventh Circuit has repeatedly insisted that "only those comments that pose a 'serious and imminent threat' of interference with the fair administration of justice can be constitutionally proscribed." *Chicago Council of Lawyers* v. *Bauer*, 522 F. 2d 242, 249 (7th Cir. 1975), *cert. denied*, 96 S. Ct. 3201 (1976); *see In re Oliver*, 452 F. 2d 111 (7th Cir. 1971); *Chase* v. *Robson*, 435 F. 2d 1059, 1061–62 (7th Cir. 1970). In *Chase* v. *Robson*, the court relied on this version of the "clear and present danger" standard to vacate an order proscribing public statements by counsel and defendents in a case arising out of destruction of selective service records. 435 F. 2d at 1061. It reaffirmed that holding one year later in *In re Oliver*, *supra*.

In *Chicago Council of Lawyers* v. *Bauer*, *supra*, the Seventh Circuit became the first federal appellate court to review the validity of the rules recommended by the American Bar Association and the U.S. Judicial Conference governing extrajudicial statements by attorneys. These rules, which impose per se restrictions on broad categories of statements, have been adopted as standing orders applicable to all cases in most of the federal district courts. In the context of a declaratory judgment, the Seventh Circuit reaffirmed its rule that restrictions on attorneys could be sustained only if they were necessary to protect against a serious and imminent threat to a fair trial and were the least drastic means to that end. 522 F. 2d at 249. It then undertook a thorough review of the issues and concluded that the challenged restrictions could not pass constitutional muster.

While the court's language was born of the "clear and present danger" cases, its analysis was rooted in a careful balancing of interests. The rules might be viewed as the "least burdensome alternative," the court suggested, if they could contribute significantly to solving the problems of prejudicial publicity while "prohibiting only the speech of a very small group whose members are officers of the court with a special interest in protecting the integrity of" the judicial

[16] The prior restraint cases are discussed more fully, *supra* pp. 8–9.
[17] *See* p. 37, *infra*.
[18] *See* p. 44, *infra*.
[19] *See* pp. 46–48, *infra*.

process. 522 F. 2d at 250. Yet there were important countervailing factors. Lawyers "are a crucial source of information and opinion" since they are often more credible, knowledgeable, and articulate than either their clients or most members of the public. Litigation often involves areas of public concern, and lawyers are frequently "in a position to act as a check on government by exposing abuses or urging action." To argue that such comments can be made after the trial is over is to ignore the fact that immediate action may be necessary and that the public's attention can best be commanded while the litigation is pending. 522 F. 2d at 250.

The court deemed restrictions invoked against defense counsel in criminal cases especially questionable. It noted that the Sixth Amendment speaks only of the rights of the accused and not of the rights of the government; that judicial restraints may make it difficult for defendants to counter injury to themselves and to their families resulting from prejudicial publicity; and that the scales of public opinion are weighted very heavily against the defendant after he or she has been indicted. 522 F. 2d at 250.

The court declined, however, to prohibit all restraints on defense attorneys. Instead it argued "that public justice is no less important than an accused's right to a fair trial." Even more compelling, it suggested, was the "mandate" of *Sheppard* v. *Maxwell*, 384 U.S. 333, 363 (1966), that restrictive rules should cut both ways; that "[n]either prosecutors [nor] counsel for defense . . . should be permitted to frustrate [the courts'] function." Despite the considerations dictating stricter scrutiny of restrictions against defense attorneys, the court concluded such restraints were sometimes permissible.

Nevertheless, the court concluded that the rules recommended by the ABA and the Judicial Conference were constitutionally infirm. One central constitutional failing pervaded all of the challenged rules: No blanket prohibition or per se proscription of certain areas of comment could pass the "serious and imminent threat" standard, declared the court, without consideration of the actual danger posed under the circumstances of a particular case. Nevertheless, the court did see a need for specific provisions, establishing a rebuttable presumption of a serious and imminent threat, in order to provide lawyers with notice of the kinds of statements which might get them into legal trouble. With the inclusion of the "serious and imminent threat" standard, the court suggested, many of the challenged rules could validly serve to establish such a presumption. Recognizing that shifting the burden of proof would itself constitute a serious limitation on freedom of expression, the court went on to examine each provision of the challenged rules to determine whether it provided a proper basis for that presumption. 522 F. 2d at 251–59.

The court held that the challenged restrictions on extrajudicial statements during investigative stages could be used as a presumption of a serious and imminent threat, but only as to prosecuting attorneys. The court reasoned that since the political process is the primary check upon prosecutorial discretion it was "imperative that we allow as much public discussion as feasible" by defense attorneys as to the way that discretion is exercised. Government attorneys, on the other hand, could ensure the proper exercise of prosecutorial authority without resorting to public opinion. The competing interests necessitated one-

sided rules. While such a solution might leave prosecutors unable to respond to unfair criticism, their response would ultimately come in the form of an indictment. 522 F. 2d at 253.

The court was considerably more lenient in its treatment of the rules regulating comments by attorneys between the time of arrest or filing of charges and the commencement of trial. While it saw little difference in the First Amendment interests at stake during this period, it felt that both the possibility of prejudice and the government's interest in preventing the appearance of trial by newspaper were considerably more compelling once judicial proceedings had actually begun. The court dismissed the argument that an attorney might want to "take his case to the public" in order to raise defense funds, noting that indigent defendants have a right to counsel at government expense. It concluded that the pretrial regulations could validly establish a presumption against the speaker, provided that abstract discussion of the merits of relevant statutes was not prohibited. 522 F. 2d at 255.

The court's balancing approach led it to condone even broader restrictions during jury selection and jury trial. It noted that the period of time in which the restriction would be in effect would be relatively limited even in the case of a lengthy trial, and that the danger of prejudice was especially great during this period. Accordingly it held that, while the restriction on discussion of "other matters" was unconstitutionally vague, any statements relating to the trial, parties, or issues in the trial could constitutionally establish a presumption of conduct imminently and seriously threatening the fairness of a trial. 522 F. 2d at 255–56. The court rejected the contention that such a presumption could not be applied to bench trials, arguing that some benefit would be derived if prejudicial material never come to the attention of the trial judge. 522 F. 2d at 256–57.

The court held that post-trial comments made prior to sentencing "could never be deemed a serious and imminent threat" to the fair administration of justice, since judges are entitled to consider almost any factor they deem relevant in exercising their sentencing discretion. 522 F. 2d at 257.

Finally, the court held that the restrictions on comment relating to civil proceedings could not serve as the basis for a presumption of validly prohibited conduct. The court again proceeded by balancing the fair trial interests protected by the rule against the affected interests in freedom of expression. It began by noting that the goal of preserving jury impartiality, while certainly important, is not as compelling in civil disputes as in criminal prosecutions. Since civil litigation generally lasts much longer than criminal litigation, rules providing for blanket coverage of the period of "investigation or litigation" in civil cases would have a profound impact on First Amendment interests.

A civil case, the court observed, might last for years just in the discovery stage and might be extended by many years of appeals. If the term "investigation" were broadly construed, speech might be restricted for years before a complaint was even filed. Since civil litigation often involves important social or political issues, such broad restrictions were constitutionally impermissible. 522 F.2d at 258.

Since the Seventh Circuit cases all involved appeals by silenced trial participants, they do not tell us whether restraints on the release of information would be held to violate a right *of the media* to gather news or a right *of the public* to information regarding pending litigation. The Sixth Circuit in *CBS* v. *Young*, 522 F.2d 234 (6th Cir. 1975), answered this question in the affirmative and applied the "clear and present danger" test to invalidate a broad restrictive order.

In *CBS* a trial court handling civil damage cases stemming from the Kent State shootings had ordered, 522 F.2d 236, that

> In addition to all counsel and Court personnel, all parties concerned with this litigation, whether plaintiffs or defendants, their relatives, close friends, and associates are . . . to refrain from discussing in any manner whatsoever these cases with members of the news media or the public.

The parties to the civil action indicated that they felt the order was appropriate, but CBS asked that it be vacated principally because it violated the First Amendment right to gather news. The Court dealt first with the question of standing, ruling that although the petitioner was not made a specific target of the order, it was "nevertheless effectively cut off from any access whatever to important sources of information about the trial." 522 F.2d at 237. Citing dictum from *Branzburg v. Hayes* that without "some protection for seeking out the news, freedom of the press could be eviscerated," 408 U.S. 665, 681 (1972), the Court concluded that the silence order abridged CBS's "constitutionally guaranteed right as a member of the press to gather news." 522 F.2d at 238. The court went on to note that "the First Amendment guarantee of freedom of the press is for the benefit of all the people and not a device to give the press a favored status in society," and implicitly held that the public had a right to know which embraced a right of access to those restrained by the order. 522 F.2d at 238.

Declaring that "a system of prior restraints of expression bears a heavy presumption against its constitutional validity," that restraints "must be narrowly drawn and cannot be upheld if reasonable alternatives are available having a lesser impact on First Amendment freedoms," and that the restraints could not "escape the proscriptions of the First Amendment" unless there was a clear showing that they were "required to obviate serious and imminent threats to the fairness and integrity of the trial," 522 F.2d at 238, 240, the court held that the presumption against the order had not been overcome.

The *CBS* case leaves important points unsettled. Because the order issued was so broad—restraining even close friends of all parties involved in the litigation—it is uncertain whether the court would have applied the clear and present danger standard to a narrower order affecting, for example, only counsel and parties. Because the circumstances of the case were found to be so far from constituting a serious and imminent threat to the administration of justice, it is questionable whether the standard to be applied to restrictions on expression in civil cases is more rigorous than that to be applied in criminal cases. Nevertheless, the Sixth Circuit applies the "least drastic means" requirement to restrictive orders and appears to join the Seventh Circuit in making serious and imminent threat to fairness a prerequisite to restrictions on trial participants.

Now that most district courts have adopted standing rules prohibiting broad categories of extrajudicial statements by attorneys,

additional circuit court decisions should be forthcoming. Inconsistent decisions are likely to continue, however, until such time as either the Supreme Court or the Congress and state legislatures take steps to clarify the conditions under which silence may be required of persons closely connected with a trial.

3. Closing Judicial Proceedings to the Press and Public

Another way to alleviate prejudicial publicity is to bar the press and public from judicial proceedings. When coupled with a ban on extrajudicial statements by participants, closure of proceedings can effectively stop much of the trial news from being reported. Even standing alone, it substantially inhibits the ability of the press to gather the news.

a. The Defendant's Right to a Public Trial

The Sixth Amendment expressly guarantees the defendant the right to a public trial. This right is not unlimited. Exclusion of all or part of the public has been permitted, for example, to eliminate overcrowding; to preserve the secrecy of grand jury proceedings; to protect secrets regarding the operation of an anti-skyjacking procedure; to prevent exposure of youthful spectators to testimony regarding sexual offenses; and to preserve the decorum of the courtroom where disruptions threaten to interfere with the administration of justice. *Levine* v. *United States*, 362 U.S. 610 (1960); *United States* v. *Bell*, 464 F.2d 667 (2d Cir.), *cert denied*, 409 U.S. 991 (1972); *United States* v. *Kobli*, 172 F.2d 919, 922 (3rd Cir. 1949).

But before exclusion of press and public can be permitted over the defendant's objection, there must be "compelling reasons." *United States* v. *Clark*, 475 F.2d 240, 246 (2d Cir. 1973). See also *Levine* v. *United States*, 362 U.S. at 618 (1960). Thus in *United States* v. *Clark*, the possibility that witnesses might inadvertently reveal part of a secret anti-skyjacking procedure, where that procedure was not the intended subject of examination, was held insufficiently compelling to justify depriving the accused of the right to a public trial. 475 F.2d at 246.

It is unlikely that the state's interest in insuring a fair trial would be found sufficiently compelling to justify depriving the defendant of the constitutional right to a public trial. It would appear, therefore, that if the defendant objects to the exclusion of the press and the public, the possibility that his or her conviction may be overturned on appeal for violation of the right to a public trial will be sufficient to protect the rights of the press.

b. Defendant's Rights Provide Inadequate Protection for the Press and Public

There are, however, three problems with relying on the defendant's objection to assure access to judicial proceedings.

First, because the order excluding the press and public is not a final order as to defendants, they cannot seek appellate review until the conclusion of the case. If the defendant wins at the trial level, the decision to exclude the press and the public may never be challenged.

Second, if the closure of proceedings took place in a criminal trial, then defendants could win reversals simply by showing that they were unjustly deprived of the right to a public trial. *United States* v. *Kobli*, 172 F. 2d 919 (3rd Cir. 1949); *Tanksley* v. *United States*, 145 F. 2d 58

(9th Cir. 1944); *Davis* v. *United States*, 247 F. 394 (8th Cir. 1917). But see *Reagan* v. *United States*, 202 F. 488 (9th Cir. 1913). But if it took place at a non-criminal proceeding, or perhaps even at a pretrial stage of a criminal proceeding, then the Sixth Amendment would not directly apply. Though the right to a public proceeding is protected by the due process clause of the Fifth Amendment, *Levine* v. *United States*, 362 U.S. 610, 616 (1960), according to *In re Oliver*, 333 U.S. 257 (1948), it is not clear that a conviction will be reversed under the due process "public trial" guarantee unless actual prejudice can be demonstrated. *Levine* v. *United States*, 362 U.S. 610 (1960). Thus, unless the defendant is able to manage the formidable task of showing that actual prejudice resulted from the exclusion of the public, the interests of the press and public may go unprotected.

Third, and most important in a fair trial-free expression context, it will often be the defendant who seeks to close the proceedings.

In light of these factors, the defendant's right to a public trial provides the press with very limited protection. This invites the more difficult question: Do the press and public themselves have First or Sixth Amendment rights of access to judicial proceedings? The answer is unclear.

c. The Rights of the Press

The Supreme Court has ruled that the press has no right of access to information not generally available to the public. This was the explicit basis for its decision in *Pell* v. *Procunier*, 417 U.S. 817 (1974) (6–3), and its companion, *Saxbe* v. *Washington Post Co.*, 417 U.S. 843 (1974) (5–4), upholding in the face of press challenges a regulation proscribing interviews of prisoners individually designated by members of the press. These rulings make clear that members of the press have no right of access to judicial proceedings unless the public has such a right.

d. The Rights of the Public

The First Amendment guarantees not only the right to speak, but also the right to listen to those who seek to speak. *Procunier* v. *Martinez*, 416 U.S. 396, 408 (1974); *Kleindienst* v. *Mandel*, 408 U.S. 753, 762–63 (1972); *Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969); *Lamont* v. *Postmaster General*, 381 U.S. 301, 307–08 (1965); *Martin* v. *City of Struthers*, 319 U.S. 141, 143 (1943). But the problem at issue here is a right of access to information which the courts seek to withhold—essentially a right to listen to those who would prefer not to speak to the public.

It is clear that the defendant has no absolute right to a private trial. *Singer* v. *United States*, 380 U.S. 24 (1965). This leaves open the possibility that the state may have discretion to grant or deny a defendant's request for closure. If, however, there is a public right to a public trial, this right would be controlling at least unless the defendant could show some likelihood that admission of the public would prejudice his or her right to a fair trial or unless the state could show some other compelling reason for closure. Where such justifications for closing a trial are shown in one degree or another, they would presumably have to be weighed against the rights claimed by the public. Moreover, any member of the public, including the press, would have standing to appeal the order immediately.

The Supreme Court has not explicitly decided—in either a First Amendment or Sixth Amendment context—whether the public has a right to a public trial.

The reasonable inference from other First Amendment cases is that there is no public constitutional right of access to information or sources the goverment seeks to protect, at least where the access sought is not related to judicial proceedings.

In *Pell* and *Saxbe*, *supra*, for instance, the Court expressly based its holding on the ground that the regulations at issue did not discriminate against the press, since they applied equally to the press and the general public. The dissenting opinions had agreed that there was no special right of press access but had argued that the rights of the public, as represented by the media, were infringed by the regulations. 417 U.S. at 839–40 (Douglas, J., dissenting); 417 U.S. at 857–64 (Powell, J., dissenting). While the majority did not explicitly rule that there was no public right of access, it is difficult to see how they could have upheld the regulation without any weighing of the needs of the prison system against the rights of the public, unless they had concluded that no such rights existed.

It is possible, however, that there may be a special public right of access to *judicial proceedings*, based either on the First or Sixth Amendments, or possibly on a "penumbra" formerly by emanations from both those amendments. *Cf. Griswold* v. *Connecticut*, 381 U.S. 479 (1965). One indication that the Supreme Court might be willing to infer such a right from other constitutional provisions came in *Estes* v. *Texas*, where the Court said, "The law, however, favors publicity in legal proceedings, so far as that object can be obtained without injustice to the persons immediately concerned." 381 U.S. 532, 542 (1965), quoting Cooley, *Constitutional Limitations* (Carrington ed. 1927), II, 931–32. Three of the four justices comprising the plurality added, 381 U.S. at 583:

> [T]he public trial provision of the Sixth Amendment is a "guarantee to an accused" designed to "safeguard against any attempt to employ our courts as instruments of persecution." Clearly the openness of the proceedings provides other benefits as well: it arguably improves the quality of testimony, it may induce unknown witnesses to come forward with relevant testimony, it may move all trial participants to perform their duties conscientiously, and it gives the public the opportunity to observe the courts in the performance of their duties and to determine whether they are performing adequately.

It is not clear whether the opinions of these three concurring justices intended to recognize a public right of access or only to say that the public was an incidental beneficiary of the defendant's right.

Four dissenting justices in the case subscribed to the statement that "[t]he suggestion that there are limits on the public's right to know what goes on in the courts causes me deep concern." 381 U.S. at 614, 615 (Stewart, J., dissenting).

Putting these three opinions together, it appears that between five and eight of the justices participating in the *Estes* case recognized some public right of access to judicial proceedings. None of these dicta, however, gave any indication of the source of this "public right," and their precedential value is unsure.

No federal appellate court has addressed a situation where a member of the public has asserted a right of access to judicial proceedings. There have been four cases, however, in which the courts have commented on the public right while dealing with claims that criminal

convictions should be reversed on Sixth Amendment grounds. Some commentators have concluded from these opinions that the circuits are in disagreement. *See*, *e.g.*, Annotation, "Right to Public Trial," 4 L. Ed. 2d 2128, 2131 (1960). An examination of the facts of the cases and the relevant dicta leave that conclusion uncertain.

In *United States* v. *Kobli*, 172 F. 2d 919 (3d Cir. 1949), the Third Circuit reversed the conviction of a defendant who had unsuccessfully objected to the clearing of the courtroom. While holding that the defendant had been denied her Sixth Amendment right to a public trial, Judge Maris wrote for a unanimous five-judge panel, 172 F. 2d at 924:

> [T]he right . . . accorded to members of the public to be present at a criminal trial as mere spectators . . . has been imbedded in our Constitution as an important safeguard not only to the accused but to the public generally . . . . [It is] a basic right which has withstood the test of the centuries.

In context, however, this may mean simply that the public has an interest in seeing that the accused is fairly tried and that the accused therefore has a right to require, if he or she so chooses, that the public be accorded the right to observe. This is borne out by the court's subsequent decision in *United States* v. *Sorrentino*, 175 F. 2d 721 (3rd Cir. 1949).

Sorrentino arose out of the same case as *Kobli* in the court below. Unlike Kobli, however, Sorrentino had waived his right to a public trial and now claimed that such a waiver could not be effective. Again, Maris wrote the opinion, this time writing for a three-judge panel. The judges, all of whom had participated in the unanimous *Kobli* opinion, were again unanimous in holding:

> While all of these rights are in a broad sense for the protection of the public generally they are in a very special sense privileges accorded to the individual member of the public who has been accused of crime. . . . To deny the right of waiver in such a situation would be "to convert a privilege into an imperative requirement" to the disadvantage of the accused. . . . We hold, therefore, that the right to a public trial was one which defendant Sorrentino might waive. [175 F.2d at 722–23.]

Since *Sorrentino* and *Kobli* were written by the same judge and decided by the same judges in the same year, they should be construed to be consistent with one another. (*Cf.* Annotation, "Right to Public Trial," 4 L. Ed. 2d at 2131, which suggests that they represent two different views.) When read together, they appear to establish only that defendants cannot successfully assert the public's right of access to win a reversal once they have waived their own Sixth Amendment rights; they tell us little about the rights of the public itself.

More recently, in *United States* v. *Clark*, 475 F. 2d 240 (2d Cir. 1973), the Second Circuit reversed a conviction because the public had been barred from the courtroom without any intentional waiver by the defendant. The court ruled, 475 F. 2d at 246–47:

> Without . . . compelling reasons . . . there was no reason to deprive the accused of *his* right to a public trial. . . .Moreover, because of the importance of providing an opportunity for the public to observe judicial proceedings at which the conduct of enforcement officials is questioned, the right to public trial should extend to suppression hearings rather than permit such crucial steps in the criminal process to become associated with secrecy.

While it is possible that this portion of the *Clark* opinion was intended to establish a public right of access, it may simply mean that in light of the public concern the defendant's right to demand a public trial should extend to suppression hearings.

The only federal appellate decision which seems to speak clearly on this issue is the Ninth Circuit's per curiam opinion in *Geise* v. *United States*, 265 F. 2d 659 (9th Cir. 1959). Geise, like Sorrentino, had waived his right to a public trial but asserted on appeal that his waiver was ineffective because he could not waive the *public's* right of access. Though the court could have dealt with the claim by holding that a violation of the public's right would not be grounds for overturning the defendant's conviction (*cf. Sorrentino*), it held instead that the "Sixth Amendment right to a public trial is a right of the accused, and of the accused only." 265 F. 2d at 660. No explanation was offered for this conclusion. One can only speculate as to whether the court would say the same thing today, after the Supreme Court's *Estes* decision, *supra*, or as to whether it would reach the same conclusion if the public's right were asserted by a member of the public.

It has been suggested that a number of other cases holding that an accused may waive his or her right to a public trial indicate implicitly that the right belongs solely to the accused. *See, e.g.*, Annotation, "Right to Public Trial," 4 L. Ed. 2d 2128, 2131 n. 8 (1960). It is reasonable, however, to read those cases as holding only that the accused may waive his or her own right, regardless of whether other rights are reserved to the public. Since no member of the public asserted such rights, the issue simply did not arise.

It is significant that the only circuit court decisions which even arguably have indicated that the public has a right of access were cases in which the defendant was held not to have waived his own right. They may have intended to establish only that the defendant has a right to insist on public access to his or her trial. Similarly, the only cases which seem to indicate the public has no right of access were cases in which its rights were alleged by a defendant seeking to escape the effects of his own public trial waiver. They may be seen as holding simply that the defendant has to fish or cut bait; that he or she cannot rely on the silent public to provide a second chance at trial. These decisions leave the status of a putative public right to open judicial proceedings uncertain.

Moreover, even if it were firmly established that there is a public right, it would be hard to weigh that right against the fair trial right of the accused or the state's interest in securing a fair trial. It is likely the balance would favor the accused; that much is implicit in the *Estes* holding forbidding televising of judicial proceedings on the ground that it infringes on the defendant's right to a fair trial. But one must question whether the public's right would be outweighed whenever there was a "reasonable likelihood" that public proceedings would threaten the fairness of the trial, or whenever there was a "substantial threat" that prejudice would result, or perhaps only when there was a substantial likelihood of a "serious" threat. Any number of standards are possible.

B. REVIEW OF RESTRICTIVE ORDERS [20]

1. Final Orders

If someone's right to speak or publish or attend judicial proceedings is directly restricted by court order, can they immediately appeal the

[20] For a thorough and thoughtful analysis of this subject, see Douglas Rendleman's excellent article, "Free Press-Fair Trial: Review of Silence Orders," 52 *N.C. L. Rev.* 127 (1973) [hereinafter cited as Rendleman].

order, or must they await the conclusion of the underlying case? 28 U.S.C. § 1291 provides for appeal only "from all final decisions of the district courts." Nevertheless, the Supreme Court has held that 28 U.S.C. § 1292, allowing appeals from certain interlocutory orders, decrees, and judgments, indicates a Congressional purpose "to allow appeals from orders other than final judgments when they have a final and irreparable effect on the rights of the parties." *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545 (1949). The purpose of the "final decision" rule "is to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results." 337 U.S. at 546. Balancing "the inconvenience and costs of piecemeal review on the one hand" against the "danger of denying justice by delay on the other," *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 152–53 (1964), the Court has held that an order is appealable if it "finally determine[s] claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949); *see Gillespie* v. *United States Steel Corp.*, 379 U.S. 148 (1964).

Silence orders are a final disposition of the right to speak or publish, and closure orders are a final disposition of the right to observe. The question of their validity must be determined independently of the merits of the case in which they are issued. Requiring that appeals await the outcome of the underlying case would not serve the interest of judicial efficiency. It would serve only to delay relief until it could no longer be effective or to prevent review altogether by mooting the issue. *United States* v. *Schiavo*, 504 F. 2d 1 (3d Cir.), *cert. denied*, 419 U.S. 1096 (1974); *United States* v. *Dickinson*, 465 F.2d 496 (5th Cir. 1972), *cert. denied*, 414 U.S. 979 (1973). Accordingly, such orders seem clearly to fall within the bounds of the "collateral order-practical finality" doctrine as outlined in *Cohen* and *Gillespie*.

It is also possible that an appeal as of right might be possible under 28 U.S.C. § 1292(a)(1), which permits appeals from orders granting or denying certain interlocutory injunctions. There is considerable disagreement, however, as to whether restrictive orders should be classified as injunctions. Moore tells us, for example:

> An order incidental to a pending action that does not grant [part] or all of the ultimate injunctive relief sought is not an injunction, however mandatory or prohibitory its terms, and indeed, notwithstanding the fact that it purports to enjoin.[21]

Arguably, courts should give statutes specifying appellate jurisdiction a "practical rather than technical construction," *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. at 546, treating restrictive orders as injunctions for purposes of § 1292, since they prohibit specified actions, and are backed up by the power of contempt.[22] At any rate, in light of our conclusion that appeal is available under the practical finality doctrine, a definitive resolution of this issue is not essential.[23]

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[21] 9 *Moore* ¶ 110.20(1) at 233.
[22] Rendleman, p. 132.
[23] This question is thoroughly discussed in *id.*, pp. 132–35.

Those restricted by silence orders have a right to immediate appeal, which at least gets them inside the door of the circuit court. It is important to remember, however, that that right standing alone does not guarantee effective review. Unless either the restrictive order or the underlying proceedings are stayed or measures are taken to expedite review,[24] the underlying case may still proceed to verdict, either mooting the appeal or making relief ineffective.

One way of seeking speedy review is through a petition for an extraordinary writ under the All Writs Statute, 28 U.S.C. § 1651. Granting of the writ is discretionary with the court, however, and the Supreme Court has indicated that such a grant will be strictly scrutinized when it interferes with the defendant's right to a speedy trial.

The Seventh Circuit has held that when freedom of extrajudicial expression is at stake issuance of writs of mandamus and prohibition is appropriate even in criminal proceedings and even when petitioners would have standing to pursue an ordinary route of appeal. *Chase* v. *Robson*, 435 F. 2d 1059, 1062 (7th Cir. 1970). Relying on the need for immediate appellate review, the court reviewed and vacated an order restraining the parties from generating any publicity about their case, which involved the destruction of draft records. It should be noted, however, that the case before the court did not pose a "speedy trial" problem, since it was the defendant who was requesting the extraordinary writ.

Additional problems arise if those who are directly restrained by the order choose not to appeal. Suppose, for example, that a group of reporters seeks relief from an order proscribing statements by trial participants. They cannot obtain review by direct appeal, since they are neither parties to the case below nor specifically enjoined by the order. In *CBS* v. *Young*, 522 F. 2d 234 (6th Cir. 1975), discussed *supra*, the Sixth Circuit held in a civil case that the press did have standing under such circumstances and that mandamus should be granted if the petitioner could show: (1) basic rights are curtailed by the order, (2) there is no available remedy other than a writ, and (3) the case is an extraordinary one involving a basic issue. There is no other federal decision addressing the issue of a reporter's standing in such a case;[25] the very absence of such decisions, however, is enough to generate some doubt that other courts would uniformly grant writs of mandamus in situations like that the Sixth Circuit confronted in *CBS* v. *Young*.

2. Appealing from Punishment After Violation: Problems of Collateral Bar

In light of the difficulty of obtaining effective appellate review, one may be tempted to violate a restrictive order and litigate its constitutionality if and when held to be in contempt. If the challenged restriction were contained in a statute, this would be a viable road to appellate review. But when one violates a court order, a subsequent finding that the order was unconstitutional will not necessarily invalidate sanctions imposed for its violation.

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[24] Fed. R. App. P. 2 provides: "In the interest of expediting decision . . . a court of appeals may . . . suspend the requirements or provisions of . . . these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction."

[25] In 1973, Rendleman reported that he had been able to find only one state case in which the media had been able to secure appellate review of a silence order by extraordinary writ. Rendleman, p. 138.

Two leading Supreme Court cases, *United States* v. *United Mine Workers*, 330 U.S. 258 (1947), and *Walker* v. *City of Birmingham*, 388 U.S. 307 (1967), crystallized the principle that, under ordinary circumstances, "an order issued by a court with jurisdiction over the subject matter and person must be obeyed" until it is reversed on appeal. "This is true without regard even for the constitutionality of the Act under which the order is issued." *United States* v. *United Mine Workers*, 330 U.S. at 293. In both *UMW* and *Walker*, however, the Court was careful to point out that there had been sufficient time to appeal before the conduct enjoined was to occur and that the injunction had more than a "frivolous pretense to validity." *Walker* v. *Birmingham*, 388 U.S. at 315–16. Indeed, the Court in *United Mine Workers* explicitly declared that a different result would have followed had the grounds for an injunction been frivolous or insubstantial. 330 U.S. at 293.

So far, the Fifth Circuit is the only federal court of appeals to rule on the applicability of the *UMW-Walker* doctrine to a case involving a restraint on speech, rather than conduct. In *United States* v. *Dickinson*, 465 F.2d 496 (5th Cir. 1972), *cert. denied*, 414 U.S. 979 (1973), the court held a restrictive order patently unconstitutional but refused to vacate the contempt convictions of reporters who had violated it.

The *Dickinson* holding may not have closed the door on the possibility of collateral attack in a situation where obeying the order pending appellate decision would have resulted in a significant delay in publishing the news. The court said that before the *Walker* rule would be applied, "adequate and effective remedies must be available for orderly review of the challenged ruling, and . . . the order must not require an irretrievable surrender of constitutional guarantees." 465 F.2d at 511. In finding both these conditions satisfied, the court noted that appellate courts "were available and could have been contacted" on the day the order was issued and that the violation did not occur until the following day. 465 F.2d at 512. The message seems to be that there was at least a possibility the reporters could have gained appellate relief without any significant delay in publication.

Nevertheless, the notion that a review which required delay would not be an "adequate and effective remedy" and would "require an irretrievable surrender of constitutional guarantees" was apparently rejected in dicta: "In the absence of strong indications that the appellate process was being deliberately stalled . . . violation with impunity does not occur simply because immediate decision is not forthcoming, even though the communication enjoined is 'news.'" 465 F.2d at 512.

Members of the press have objected vehemently to this aspect of the *Dickinson* decision on the grounds that, whereas the United Mine Workers and the marchers in *Walker* had ample time to appeal before the scheduled commencement of their actions, "even a minor delay in the publication of news can prove devastating to the rights of the public and the media." Brief Amicus Curiae of the Reporters Committee for Freedom of the Press (1974), *Times-Picayune Publishing Corp.* v. *Schulingkamp*, *stay granted*, 419 U.S. 1301 (1974), *appeal dismissed as moot*, 420 U.S. 985 (1975).

This view may yet receive a sympathetic hearing from the Supreme Court. In reversing the contempt conviction in *Bridges* v. *California*,

discussed *supra*, the Court emphasized the effect of delay in reporting the news, 314 U.S. at 268:

> It must be recognized that public interest is much more likely to be kindled by a controversial event of the day than by a generalization, however penetrating, of the historian or scientist. Since they punish utterances made during the pendency of a case, the judgments below therefore produce their restrictive results at the precise time when public interest in the matters discussed would naturally be at its height.

Indeed, the *Dickinson* opinion itself recognized that timeliness of publication is the hallmark of "news." 465 F.2d at 512.

There have been a number of judicial suggestions that the "adequate remedies" exception should be invoked in gag order cases to avoid the effects of the *Walker* rule. In rejecting a mootness contention in *United States* v. *Schiavo*, 504 F.2d 1 (3d Cir.), *cert. denied*, 419 U.S. 1096 (1974), the Third Circuit pointed out that "the underlying criminal proceeding would almost always terminate before the appellate court hears the case." 504 F.2d at 5. Three of the Circuit's judges took advantage of the occasion to note in their concurring opinion, 504 F.2d at 10–11:

> It can be argued that "adequate and effective" appellate remedies are frequently lacking when silence orders are issued during the course of a criminal case.
>
> The facts of this case offer an illustrative situation. The district court issued its oral order at 2:00 P.M. on Friday afternoon and denied the motion to vacate about two hours later. Representatives of the media immediately filed notice of appeal. Both in the district court and here they moved for a stay. The district court denied the request and this Court did not grant a stay until the following Wednesday, five days later. On that same day, the jury returned its verdict . . .
>
> Despite vigorous pursuit of their appeal and prompt action by this Court, they were unable to press their objections to the order until the practical effect of success on appeal, at least in this case, had become insubstantial. To put litigants in appellants' position to the choice of obeying an order and awaiting appellate action while their alleged civil rights continue to be infringed, or of disobeying the order and then facing certain contempt convictions, makes any subsequent victory on appeal Pyrrhic indeed.

Some state courts have availed themselves of the other possible exception arguably left open by *United Mine Workers* and *Walker*, permitting collateral attack on gag orders on the ground that they are "transparently invalid" or have "only a frivolous pretense to validity." *Walker* v. *Birmingham*, 388 U.S. at 315. *In State* v. *Sperry*, 79 Wash.2d 69, 483 P.2d 608, *cert. denied*, 404 U.S. 939 (1971), the court held the *Walker* rule inapposite on the ground that "a void order or decree, as distinguished from one that is merely erroneous, may be attacked in a collateral proceeding. . . . The violation of an order patently in excess of the jurisdiction of the issuing court cannot produce a valid judgment." See also *Younger* v. *Smith*, 30 Cal. App.3d 138, 106 Cal. Rptr. 225 (1973); *Wood* v. *Goodson*, 253 Ark. 196, 485 S.W.2d 213 (1972).

Given that the *UMW-Walker* rule was reaffirmed in *Walker* by a bare 5–4 majority, that its application to silence orders may involve problems not fully considered by the Supreme Court in previous cases, and that only one federal court of appeals has ruled on the subject, it is not likely that the final word has been said on whether the contempt power can be used to punish those who violate an invalid court order.

C. FIRST AMENDMENT DUE PROCESS: THE RIGHT TO PROCEDURAL SAFEGUARDS PRIOR TO ISSUANCE OF ORDERS RESTRICTING SPEECH OR NEWS-GATHERING

1. Rights of Those Directly Restrained

A number of Supreme Court decisions have required that strict procedural safeguards accompany any prior restraint on expression.[26] The Reporters Committee for Freedom of the Press has argued strongly that these decisions mandate notice and an adversary hearing prior to issuance of judicial restrictive orders.[27]

In *Freedman* v. *Maryland*, 380 U.S. 51 (1965), the Supreme Court held that a statute requiring that movies be submitted to the State Board of Censors prior to exhibition was "an invalid previous restraint" because there was no provision requiring judicial participation in the censorship procedure or even assuring prompt judicial review. The Court announced, 380 U.S. at 58 (emphasis added):

> The teaching of our cases is that, because only a judicial determination *in an adversary proceeding* ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint.

Three years later, in *Carroll* v. *President and Commissioners of Princess Anne*, 393 U.S. 175 (1968), the Court set aside an order restraining a white supremacist group from holding rallies for ten days. Declining to consider whether the circumstances justified an injunction against the rallies, the Court held, 393 U.S. at 180:

> The 10-day order here must be set aside because of a basic infirmity in the procedure by which it was obtained. It was issued *ex parte*, without notice to petitioners and without any effort, however informal, to invite or permit their participation in the proceedings. There is a place in our jurisprudence for *ex parte* issuance, without notice, of temporary restraining orders of short duration; but there is no place within the area of basic freedoms guaranteed by the First Amendment for such orders where no showing is made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate.

The Court went on to note that "the reasons for insisting upon an opportunity for hearing and notice" were even more compelling there than in earlier cases involving obscenity because "the present case involves a rally and 'political speech' in which the element of timeliness may be important." 393 U.S. at 182.

Neither the Supreme Court nor any federal court of appeals has yet ruled directly on the applicability of "First Amendment due process" requirements to gag order cases. In *United States* v. *Schiavo*, 504 F.2d 1 (3d Cir.), *cert. denied*, 419 U.S. 1096 (1974), however, the Third Circuit, sitting *en banc*, invoked its *supervisory powers* to void a restraining order against the media on procedural grounds. The court held that such an order must be preceded by "a prompt hearing after notice to the involved members of the press and parties," 504 F.2d at 8, and that both the order and the reasons for it must be reduced to writing, 504 F. 2d at 7–8. While declining to place the holding on constitutional grounds, the court noted that such procedural requirements were

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[26] See generally Henry P. Monaghan, "First Amendment 'Due Process'," 83 *Harv. L. Rev.* 518 (1970).

[27] See Jack Landau, "The Courts and the News Media: Fair Trial-Free Press: A Compromise Proposal for Procedural Due Process on Judicial Restrictive Orders" (Reporters Committee for Freedom of the Press, 1974); see also Briefs of the Reporters Committee as Amici Curiae in *Times-Picayune*, *supra*, and *CBS* v. *Young*, *supra*.

"particularly necessary in a case . . . where the . . . order affects the First Amendment rights of the press." 504 F.2d at 8. Three concurring judges argued that the court should not have relied on its supervisory powers since "First Amendment considerations do, in fact, dictate procedural requirements like those set forth by the majority." 504 F.2d at 12.

Despite the force of these arguments, opportunities for notice and hearing have rarely been accorded members of the press prior to the issuance of gag orders against them:

> [T]he courts have rather uniformly treated any kind of restrictive order preventing disclosure and publication of information as outside of the procedural requirements applicable generally to the issuance of restraining orders and injunctions. Many restrictive orders across the country, in both state and federal courts, have been entered without notice and without hearing. In some instances, these orders have been issued on the eve of trials, or invoked orally during the trial. Generally no one has appeared before the court to assert the free press right in the First Amendment. This results in orders being entered without a full exploration and understanding of the delicate balance between the constitutional requirements for a fair trial, a public trial, and a free press. [American Bar Association Legal Advisory Committee on Fair Trial and Free Press, *Revised Draft: Recommended Court Procedure to Accommodate Rights of Fair Trial and Free Press* (1975), p. 2]

The arguments relied upon by the Supreme Court in the "First Amendment due process" cases seem particularly applicable to judicial gag orders. They are final orders restricting expression regarding matters of pressing concern "in which the element of timeliness may be important" (cf. *Carroll*, *supra*, 393 U.S. at 182). Moreover the need for procedural safeguards is especially great where parties subject to the restraint may have difficulty in obtaining effective appellate review. Nevertheless, whether the Constitution requires such safeguards is likely to remain controversial until the Supreme Court sheds light on the subject.

2. Rights of those indirectly affected

A still more difficult question is posed when the press seeks to require that it be accorded notice and a hearing prior to the imposition of orders restraining trial participants. Clearly, an order gagging trial paticipants will adversely affect the press's ability to gather and report the news. And arguably, the press is entitled to such procedural protections since it has a right to listen to those who seek to speak and since this right is infringed by restrictions on the speaker.

The only federal appellate court to rule on this point has concluded otherwise. In *CBS* v. *Young*, 522 F.2d 234 (6th Cir. 1975), the Sixth Circuit explicitly rejected a proposed rule requiring notice and a hearing for the press prior to imposition of orders inhibiting their access to trial participants. The court deemed the proposal unrealistic and said it had been unable to find any authority to support it. 522 F.2d at 241 n.2.

III. Proposals and Reports

A. Proposed Legislation and Hearings

In 1965, Senator Wayne Morse (D-Ore.) and others introduced S. 290, entitled, "A bill to protect the integrity of the court and jury functions in criminal cases." This bill, which had been introduced

in the 88th Congress as S. 1802, would have made it a contempt of court for any federal employee, defendant, or attorney to "make available for publication information not already properly filed with the court which might affect the outcome of any pending criminal litigation, except evidence that has already been admitted at the trial."

S. 290 was endorsed in 1964 by the U.S. Judicial Conference. *Annual Report of Judicial Conference* (1964), pp. 84–85. This endorsement has since been modified, however, by the issuance of the Conference's own report (discussed *infra*), which seemed explicitly to disavow advocacy of restraints on defendants such as those of S. 290.[1]

Four days of joint hearings were held by the Senate Judiciary Committee's Subcommittee on Constitutional Rights and Subcommittee on Improvements in Judicial Machinery. Hearings Before the Subcommittee on Constitutional Rights and the Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, 89th Cong., 1st Sess. (August 17–20, 1965). No further action was taken on the bill.

B. OTHER MAJOR REPORTS AND PROPOSALS

1. The American Bar Association

In 1966, the American Bar Association's Advisory Committee on Fair Trial and Free Press, headed by Justice Paul C. Reardon, with David L. Shapiro as reporter, issued what remains the most thoughtful and comprehensive report on fair trial-free expression problems. The pioneering report and its recommendations, relating only to criminal trials, were adopted with minor modifications by the ABA House of Delegates in 1968. American Bar Association Project on Standards for Criminal Justice, *Standards Relating to Fair Trial and Free Press* (1968) [hereinafter cited as *Reardon Report*]. It is "must" reading for anyone studying the fair trial-free expression issue.

a. Direct Restraints on the Press

The Reardon Committee emphatically rejected the suggestion that courts should increase the use of their contempt power against the press. It noted, first, that the British experience suggested "that the exercise of such power by judges may serve to stifle desirable public discussions of issues and to diminish the crusading zeal of the press . . . [possibly leading to] a greater reluctance to expose crime, or corruption in public places, or to engage in constructive criticism of the conduct of judicial proceedings." *Reardon Report*, p. 70; *ibid*, n. 195. Moreover, the Committee concluded, expanded use of the contempt power against the press might impair the benefits derived from informing the public and from a full discussion of issues of public importance, and would pose serious constitutional problems.

Despite these reservations, the Committee did recommend use of the contempt power in two situations: (1) when, knowing that a jury is being selected for a criminal trial or that a criminal trial by jury is in progress, and with the intent of affecting the trial's outcome, someone disseminates a statement going beyond the public

[1] 45 F.R.D. 391, 407 (1969).

record of the court and in fact presenting a clear and present danger of prejudice to the proceedings; and (2) when anyone (including the press) violates a valid order not to disseminate information referred to in a hearing which has been closed to the press and the public in order to prevent disclosure of possibly prejudicial material. *Reardon Report*, pp. 13–14, Recommendation 4.1 (Approved Draft), 27, 153.

The Committee pointed out that its contempt recommendation is narrower than the constitutional power of the courts in that it does not "reach pretrial statements even when they pose a clear and present danger to the fairness of the ultimate trial." *Reardon Report*, p. 27 (Approved Draft). The Report does not explicitly provide that orders restricting the dissemination of information referred to in a closed hearing may be issued only upon a showing that such dissemination poses a clear and present danger. However, in the context of its explicit recognition that the Supreme Court's decisions indicate use of the contempt power against the media is "limited by the requirements of the 'clear and present danger' test," *id.*, p. 70, it seems fair to conclude that this standard was intended to be subsumed under the requirement that an order, to be enforceable, must be "valid."

More recently, the Reardon Committee's successor, the ABA Legal Advisory Committee on Fair Trial and Free Press, has focused much of its attention on obtaining voluntary agreements in each state between the bar and the press. These agreements vary, but the Committee's composite "distillation" of agreements entered into in approximately half the states reads in part as follows:

> All concerned should be aware of the dangers of prejudice in making pretrial disclosures of the following types of information, which lawyers for the prosecution or defense are forbidden by the Code of Professional Responsibility from releasing publicly.
>
> (a) opinions about an accused's character, guilt or innocence;
>
> (b) admissions, confessions or the contents of a statement attributed to the accused, except that a lawyer may announce that the accused denies the charges against him;
>
> (c) references to the results of any examinations or tests . . .;
>
> (d) statements concerning the credibility or anticipated testimony of prospective witnesses;
>
> (e) opinions concerning evidence or argument in the case;
>
> (f) prior criminal charges and convictions, although they usually are matters of public record. (Their publication may be especially prejudicial immediately preceding trial.)
>
> 3. When a trial has begun, the news media generally may report anything done or said in open court. They should consider very carefully, however, publication of any matter or statement excluded from evidence outside the presence of the jury. This type of information may be highly prejudicial, and if it reaches the jury could result in a mistrial. This precaution is especially important in instances when the jury has not been sequestered for the duration of the trial. [The American Bar Association Legal Advisory Committee on Fair Trial and Free Press, *Fair Trial/Free Press Voluntary Agreements* (1974), p. 8.]

b. Restraints on Trial Participants

Notwithstanding its recommendation that the contempt power be used as a direct restraint on the press under certain very limited circumstances, the report emphasized that the heart of the solution lies in controlling the release of information, primarily by attorneys, law enforcement officers, and judicial employees, and in introducing additional safeguards into the conduct of judicial proceedings.

(1) *Restrictions on Attorneys.*—In approving the report, the Bar Association voted to incorporate into the Code of Professional Responsibility new provisions (EC 7–33 and DR 7–107) based on the notion that it

> Is the duty of the lawyer not to release . . . information or opinion for dissemination by any means of public communication, in connection with pending or imminent criminal litigation . . . if there is a *reasonable likelihood* that such dssemination will interfere with a fair trial or otherwise prejudce the due administration of justice. [*Reardon Report*, p. 1, Recommendation 1.1 (Approved Draft) (emphasis added).]

Violation of these provisions is punishable by professional discipline ranging from reprimand through suspension to disbarment. *Id.*, pp. 3, 4. During the course of a pending criminal investigation, attorneys are to refrain from making any extrajudicial public statements going beyond the public record unless they are necessary for narrowly limited reasons specified by the Standards (*ibid.*) and by DR 7–107(A).

From arrest until the beginning of the trial, neither the defense counsel nor the prosecuting attorney are to release statements concerning: "(1) the prior criminal record . . .. character or reputation of the accused, . . .; (2) . . . any confession, admission or statement given by the accused, or the refusal . . . to make any statement; (3) the performance of . . . [or refusal to submit to] any examinations or tests . . .; (4) the identity, testimony, or credibility of prospective witnesses . . .: (5) the possibility of a plea of guilty . . .; (6) any opinion as to the accused's guilt . . . or as to the merits of the evidence in the case." *Reardon Report*, p. 2, Recommendation 1.1 (Approved Draft), DR 7–107(B).

While the trial or jury selection is in progress, neither the prosecutor nor the defense attorney is to "give or authorize any extrajudicial statement . . . relating to the trial or the parties or issues in the trial." *Id.*, p. 3, Recommendation 1.1 (Approved Draft), DR 7–107(D). Finally, prior to sentencing, neither lawyer is to make or authorize any extrajudicial public statement "if there is a reasonable likelihood that such dissemination will affect the imposition of sentence." *Ibid*, DR 7–107(E).

The Report concluded that such restrictions on attorneys posed no constitutional problems since lawyers "have a fiduciary obligation to the courts and are subject to appropriate discipline", and since

> (1) the restrictions are limited as to time . . . [of application]; (2) . . . [those governing] pretrial statements relate to specific matters whose disclosure poses a significant threat to the fairness of the ultimate trial; (3) . . . [they] are applicable only to those attorneys participating in the investigation, prosecution, or defense of a criminal case. [In addition] the recommendations contain several provisions designed to make it clear that certain kinds of statements may properly be made because the need to inform the public or to aid in the investigation, prosecution, or defense outweighs any hazard that the statement may present. *Id.*, p. 82.

The Reardon Report itself did not consider civil cases and specifically limited its recommendations to criminal proceedings.[2]

Nevertheless, when the drafters of the ABA's Code of Professional Responsibility met to incorporate the Reardon Report's recommenda-

[2] The Committee concluded that civil litigation fell outside the scope of its assignment. *Reardon Report*, p. 84.

tions into the new Code, they decided that similar restrictions ought to apply to attorneys in civil cases. Their consideration on that point had the benefit of neither working papers nor detailed discussion; it simply seemed logical to them that lawyers should be bound by the same ethical standards regardless of the nature of the case.[3]

(2) *Restrictions on Law Enforcement Officers.*—The Reardon Report urged law enforcement agencies to adopt internal regulations imposing restrictions on release of information by its officers similar to those suggested for attorneys. In the event that such regulations were not adopted and enforced by a particular agency, the report recommended that they be implemented by legislation or rule of court, with appropriate sanctions. *Reardon Report*, pp. 4–6, Recommendation 2 (Approved Draft). Constitutional objections to these restrictions were rejected on the ground that "law enforcement officers are servants of government and, like lawyers, have a fiduciary obligation to maintain the integrity of the criminal process." *Id.*, p. 99. Despite the absence of explicit language limiting the application of these guidelines to those officers connected in their official capacities with the case commented upon, it seems fair to assume that such a limitation was intended. Any broader restriction, at least if imposed by court order, would be difficult to square with the Court's holding in *Wood* v. *Georgia*, 370 U.S. 375 (1962), discussed *supra*.

(3) *Restrictions on Judicial Employees.*—The courts were urged to adopt rules proscribing the disclosure by judicial employees of information relating to a pending criminal case that is not part of the public record and that might "*tend* to interfere with the *right of the people* or of the defendant to a fair trial." *Reardon Report*, p. 6, Recommendation 2.3 (Approved Draft) (emphasis added). Whenever appropriate in light of the issues or notoriety of the case, they may also be specially directed to refrain from making extrajudicial statements regarding the case.

(4) *Restrictions on Parties, Witnesses, and Jurors.*—The Committee concluded that a general rule forbidding extrajudicial statements by parties, witnesses, and jurors was unnecessary and of questionable constitutionality. *Reardon Report*, p. 142. Nevertheless, it did recommend that, "whenever appropriate in light of the . . . notoriety of the case," during the course of an ongoing trial the court should instruct parties, witnesses, and jurors, as well as court employees, not to make any extrajudicial statements about the case. *Id.* p. 11, Recommendation 3.5(c) (Approved Draft). The indication in *Sheppard* that "the trial court might well have proscribed extrajudicial statements by any lawyer, party, witness or court official which divulged prejudicial matters" (384 U.S. at 361) was cited to justify this proposal. *Id.*, p. 142. Lacking further explanation, the implication is that the First Amendment rights abridged are outweighed by the requirements of a fair trial.

c. Restrictions on Access to Judicial Proceedings

The Committee concluded that the defendant's right to a fair trial was clearly paramount to any public trial right which might arguably belong to the public. It therefore recommended that a defendant's motion to exclude the press and public from any pretrial hearing be

[3] Telephone Conversation with Prof. John Sutton, Reporter, ABA Special Committee on Evaluation of Ethical Standards (1976).

granted unless "there is no substantial likelihood" that prejudice will result from disclosure at the hearing of evidence or argument which will be inadmissible at trial. *Reardon Report*, p. 7, Recommendation 3.1 (Approved Draft). The same standard applies to motions to close any portion of the trial which takes place outside the presence of the jury, unless the jury has been sequestered. *Id.*, p. 11, Recommendation 3.5(d) (Approved Draft). With the consent of the defendant, the court may take such action *sua sponte* or at the request of the prosecution. A complete record of closed proceedings is to be made available after the case is discharged. *Id.*, pp. 7, 11, 12.

Despite these recommendations, the Report observed that closing proceedings is only a limited solution to the publicity problem, since it entails a waiver by defendants of the constitutional right to a public trial and cannot prevent disclosures from other sources. *Id.*, p. 75.

d. Use of Traditional Techniques to Insure Juror Impartiality

Courts have traditionally relied on a wide-ranging arsenal of techniques—not requiring restrictions on expression or access to information—to insure juror impartiality. While finding these techniques inadequate concurrently to assure a fair trial and to preserve fully the other rights of the defendant and public, the Committee concluded that their potential effectiveness was often frustrated because of the trial courts' reluctance to grant relief. Accordingly, it recommended new methods and new standards for use of traditional remedies.

(1) *Change of Venue or Continuance.*—Although a change of venue may require that the defendant forgo the right to a trial in the venue where the crime was alleged to have been committed and a continuance may impinge on his interest in a speedy trial, the Committee found that these devices could be of considerable value in insuring an impartial jury. Despite some cases in which they might be blunted by renewed or extremely widespread publicity, its research demonstrated that changes of venue or continuance could often be quite effective. Trial judges did not take full advantage of these remedies, however, perhaps because they were anxious to avoid delay and additional expense and were inherently unwilling to concede that their court could not provide an impartial forum. *Reardon Report*, p. 121.[4]

To alleviate this problem, the ABA recommended a new standard, based upon language in the *Sheppard* case, to make it easier for the defendant to obtain relief:

> A motion for change of venue or continuance shall be granted whenever it is determined that because of the dissemination of potentially prejudicial material, there is a *reasonable likelihood* that in the absence of such relief, a fair trial cannot be had. *Reardon Report*, p. 8, Recommendation 3.2(c) (Approved Draft) (emphasis added).

The recommendation also provided for liberalized methods of proof, including particularly the use of opinion surveys to establish the existence of prejudice in the venue. *Id.*, Recommendation 3.2(b). Although such surveys had seldom been admittted in that context and some courts had excluded them on hearsay or unreliability grounds, the ABA concluded that their use should be permitted. *Id.*, p. 125.

(2) *Selection of the Jury.*—The practice most frequently used to assure selection of a jury unprejudiced by pretrial publicity is the voir

[4] *See also* Arthur D. Austin, "Prejudice and Change of Venue" 68 *Dick. L. Rev.* 401, 408 (1964).

dire examination of the venire. The Committee expressed severe reservations about the effectiveness of this procedure. It relied heavily upon a study which concluded that "jurors often, either consciously or unconsciously, lie on *voir dire*," shaping their answers to further their interest in being included in or excluded from the jury.[5] Moreover, the Committee was concerned that exposure to pretrial publicity may have a substantial, subconscious effect, even though the jurors believe they are unaffected by it. *Reardon Report*, pp. 55–56, 61.

Nevertheless, its surveys indicated that members of the bench and bar considered the procedure to be relatively effective in those localities where the examination of each prospective juror took place out of the presence of others. *Id.*, Appendix A, pp. 186–187. Therefore, in addition to outlining the factors which should be weighed in considering whether a prospective juror is sufficiently impartial to serve, the Committee recommended that whenever there is a "significant possibility" that some member of the venire will be ineligible because of exposure to prejudicial material, the examination of each juror should take place outside the presence of the others. *Id.*, p. 9, Recommendation 3.4 (Approved Draft).

One method which has sometimes been used to avoid the effects of pretrial publicity is to call jurors from other localities within the district. While noting that this would normally be less effective than a change of venue since jurors would be exposed to publicity once they entered the district, the Committee recommended that courts be given the authority to draw jurors from other localities in the state or federal district "whenever it is determined that potentially prejudicial news coverage of a given criminal matter has been intense and has been concentrated primarily in a given locality. . . ." *Id.*, p. 10, Recommendation 3.4(c) (Approved Draft); *id.*, pp. 137–38.

(3) *Waiver of Jury Trial.*—While noting that waiver of a jury trial is an inadequate solution to the problems of prejudice since it forces the defendant to choose between two constitutional rights, the ABA recommended that it should be permitted whenever (1) it is knowingly and voluntarily made, and (2) it is reasonable for the defendant to conclude that because of dissemination of prejudicial material a trial without a jury is likely to be more fair than a jury trial. *Reardon Report*, p. 9, Recommendation 3.3 (Approved Draft); *id.*, p. 130.

(4) *Sequestration of the Jury.*—The standards provide that sequestration "shall be ordered" if it is likely that highly prejudicial matters will otherwise come to the attention of the jurors. *Reardon Report*, p. 11, Recommendation 3.5(b) (Approved Draft). In order to minimize prejudice which may result from juror resentment, jurors are not to be told who requested sequestration. The standard requiring a likelihood that highly prejudicial matters will reach the jury stands in sharp contrast to the much less demanding standard for closing proceedings and the complete lack of a standard for restricting statements by attorneys, law enforcement officers, and judicial employees. The more stringent requirements reflect the Committee's recognition that sequestration is expensive for the state and inconvenient for the jurors and may, despite the court's precautions, lead to juror prejudice against the party suspected of requesting sequestration. The

[5] Dale W. Broeder, "Voir Dire Examinations: An Empirical Study," 38 *So. Cal. L. Rev.* 503, 528 (1965).

Committee also noted that sequestration could not help to selve the problems caused by pretrial publicity. *Id.*, p. 142.

(5) *Cautioning Jurors.*—The Committee suggested a model admonition to the jury proscribing exposure to out-of-court reports concerning the proceedings. *Reardon Report*, p. 12, Recommendation 3.5(e) (Approved Draft). Although its surveys indicated that about 90% of the total sample of defense attorneys and over 40% of judges having definite opinions thought such warnings were ineffective. *id.*, Appendix A, p. 189, the Committee concluded that a "properly framed admonition is likely to be helpful," *id.*, p. 145.

(6) *Examining Jurors During Trial.*—

> When material has been disseminated which goes beyond the record on which the case is to be submitted to the jury and raises serious questions of possible prejudice, the court may on its own motion or shall on motion of either party question each juror, out of the presence of the others, about his exposure to that material. The examination shall take place in the presence of counsel, and an accurate record . . . shall be kept. [*Reardon Report*, p. 13, Recommendation 3.5 (f) (Approved Draft).]

(7) *Setting Aside the Verdict.*—When the judge discovers after submission of the verdict that, despite precautions, there is a substantial likelihood that the vote of one or more jurors was influenced by extrajudicial information not part of the court record, the verdict is to be set aside and a new trial granted. *Reardon Report*, p. 13, Recommendation 3.6 (Approved Draft).

e. Procedure for Issuing Restrictive Orders

As noted earlier, the Reporters Committee for Freedom of the Press has urged that the press be accorded the right to notice and a hearing before the issuance of any order restraining publication or release of information to the press.[6] The ABA's Legal Advisory Committee on Fair Trial and Free Press [7] considered the Reporters Committee proposal, modified it, and submitted its altered version to the ABA House of Delegates, which at its August 1976 meeting approved the committee's recommendations. American Bar Association, *Summary of Action of the House of Delegates, 1976 Annual Meeting* (Aug. 1976), p. 9.

The ABA Committee concluded that restrictive orders should be issued only as a last resort:

> It is clear that the free flow of information concerning court business is important not only to the requirements of a free press and a fair and public trial, but to greater public understanding of the judicial function and the rule of law in our society. . . . [A]ttention is called to the many methods for protecting a trial from the effects of prejudicial publicity outlined by Mr. Justice Clark in *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966) . . . . The Committee regards such alternatives as preferable to the use of judicial restrictive orders. [*Revised Draft: Recommended Court Procedures To Accommodate Rights of Fair Trial and Free Press* (1975), p. 7.]

The ABA Committee's draft adopts the Reporters Committee proposal that general policies of the courts which are intended to restrict prejudicial publicity should be adopted as Standing Guidelines, rather than Standing Orders.[8] These Guidelines would not be enforceable by contempt, but other sanctions for violations would still be available

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[6] Jack Landau, *The Courts and the News Media: Fair Trial-Free Press: A Compromise Proposal for Procedural Due Process on Judicial Restrictive Orders* (Reporters Committee for Freedom of the Press, 1974).

[7] Currently chaired by Judge Paul H. Roney of the Fifth Circuit of Appeals.

[8] *Revised Draft*, p. 5.

against lawyers (disbarment or ethics committee censure), court officials (discharge), and police (disciplinary action by civil service commissions and police review boards, or internal discipline within the police department). *Revised Draft: Recommended Court Procedure To Accommodate Rights of Fair Trial and Free Press* (1975), p. 6. Special orders, "tailored to the particular circumstances of the case," and punishable by contempt, "would be reserved for specific cases in which . . . prejudicial publicity poses such a substantial threat to a fair trial as would justify use of the court's contempt power," and in which other procedures for assuring a fair trial are inadequate.[9] The Committee explained:

> First, experience has shown that standing orders of general application are largely ignored in cases of little public interest. When the sensational trial appears, there is general confusion as to whether the standing order will be enforced, and what parts of such order apply to the particular case. With a Special Order tailored to specific circumstances, this potential area of misunderstanding and conflict would be eliminated. In the meantime, the Standing Guidelines would serve to establish the normal standards of conduct. Second, developing a Special Order tailored to a single case would afford the court the opportunity to best resolve any fair trial-free press conflict that might arise.[10]

One might wonder whether there is an arguable conflict between the Committee's conclusion, on the one hand, that restrictions on speech should be countenanced only in those exceptional cases where all other procedures are inadequate for dealing with a very substantial threat to the fairness of a trial, and, on the other, its proposal that standing guidelines applicable to all cases should be enforceable by professional sanctions.

Under the Committee's proposal, all affected parties and the general public must be given notice of proposed standing guidelines and provided with an opportunity to present arguments for change. After soliciting written comments and scheduling meetings with interested persons, the court adopts and distributes widely a set of tentative guidelines. Anyone who objects to these guidelines is to be given an opportunity for a hearing. Following such a hearing, the court adopts final guidelines stating the reasons for their adoption, with particular explanations regarding controversial provisions. Finally, some method of appellate review is to be afforded any interested persons, without reference to a specific case. *Id.*, pp. 9–10.

A similar procedure is recommended for promulgation of Special Orders. Thus, notice is to be given in a manner set forth in the Standing Guidelines; written comments received; "objections . . . heard at a formal or evidentiary hearing, depending upon the circumstances and within the discretion of the court"; the order specific in its terms, setting forth the reasons for issuance; and appellate review "in the most expeditious manner provided by the . . . jurisdiction for review of temporary injunction orders or any other orders which are subject to expedited review" accorded anyone "aggrieved by the Special Order." *Id.*, pp. 10–11.

f. Summary of the ABA Position

The Reardon Report rejected any direct restraints on the press's right to report what transpires in open court but explicitly approved direct prior restraints on reporting of events which take place in

[9] *Ibid.*
[10] *Id.*, pp. 5–6.

proceedings closed to the press and the public. It also recommended standing restraints, applicable to all cases, on the release of information by attorneys, law enforcement officers, and judicial employees. While rejecting standing restrictions on other trial participants, it suggested that in notorious cases the court should instruct parties, witnesses, jurors, and judicial employees not to make extrajudicial, public statements about the case. It provided that a defendant's motion to close pretrial and other proceedings taking place out of the presence of the jury should be granted unless there is no substantial likelihood that prejudice may otherwise result from disclosure of information inadmissible at trial. Finally, it recommended more liberal use of traditional means of assuring jurors' impartiality.

The Legal Advisory Committee on Fair Trial-Free Press has concluded that restraints on extrajudicial speech should not be imposed unless all other available procedures prove inadequate to protect against a very substantial threat to the fairness of a trial. Nevertheless, the Committee has recommended the adoption of standing guidelines to restrict such extrajudicial statements. These guidelines would be applicable to all cases, regardless of whether any threat of prejudice existed, and would be enforceable by professional sanction.

Despite this arguable inconsistency, the Committee has performed a valuable service in recommending: (1) that contempt power be available only to enforce Special Orders issued in sensational cases; (2) that neither Special Orders nor more general Standing Guidelines be issued except after adequate notice and opportunity for comment and hearing; (3) that such Guidelines or Orders be in writing and accompanied by a statement of the reasons for their adoption; (4) that all interested persons be accorded an avenue to appeal Standing Guidelines, without regard to a particular case; and (5) that all aggrieved parties be accorded the right to expedited appellate review of Special Orders.

2. Association of the Bar of the City of New York

Shortly after the appearance of the Tentative Draft of the Reardon Report, a committee of the Association of the Bar of the City of New York, chaired by U.S. Circuit Judge Harold Medina, issued a report recommending similar standards for the release of information by attorneys and law enforcement agencies, but differing from the ABA report in several respects. Special Committee on Radio, Television, and the Administration of Justice of the Association of the Bar of the City of New York, *Freedom of the Press and Fair Trial: Final Report with Recommendations* (New York, 1967) [hereinafter referred to as the *Medina Report*].

a. Direct Restraints on the Press

The Medina Report concluded that imposition of direct restraints on the press would be unconstitutional and unwise under any circumstances. The "guarantees of the First Amendment," it concluded, "will prevent the use of the contempt power [or criminal proceedings] to control the news media even where the impartiality of a petit jury is endangered." *Medina Report*, p. 6.

b. Restraints on Trial Participants

The Medina Committee's recommendations regarding restraints on trial participants were, on the whole, more far-reaching than those of

the Reardon Report. Unlike the Reardon Committee, it drew no distinction regarding the severity of appropriate restrictions at various stages from the time a judicial proceeding is first "anticipated" until the time it is concluded. It recommended that broad restrictions be imposed on extrajudicial statements by lawyers in all civil as well as criminal cases. Moreover, it urged that lawyers be required to attempt to restrain their clients and witnesses from making any out-of-court statements of the sort proscribed for lawyers. *Medina Report*, pp. 25–26. With regard to direct restrictions on parties and witnesses, it again went beyond the proposals of the Reardon Committee and suggested that restrictive orders aimed at particular cases would be appropriate in civil as well as in criminal proceedings. *Id.*, pp. 54–55.

The Medina Committee joined in urging that law enforcement agencies adopt broad restrictions on the release of information by their officers but concluded that courts have no authority to enforce that recommendation except for "particular police officers [who] have had such a close and intimate relationship to the trial that they may be said to be part of the trial itself." *Id.*, p. 57. *See also* pp. 30–35, 39.

c. Traditional Techniques

In other areas, the two committees were substantially in agreement. The Medina Report declared that effective warnings to jurors are of "the utmost importance" and suggested that jurors who disregard such warnings should be held in contempt of court. *Medina Report*, pp. 52–53. It urged that voir dire examination of the venire in sensational cases "be made of each prospective juror separately and not in the presence of the other jurors on the panel. . . ." *Id.*, p. 52. And it urged more frequent use of the traditional methods of safeguarding juror impartiality. *Id.*, p. 57.

3. United States Judicial Conference

In 1969, the Judicial Conference of the United States adopted a series of fair trial-free expression recommendations contained in the report of a committee headed by Judge Irving R. Kaufman of the U.S. Court of Appeals for the Second Circuit. Judicial Conference of the United States, Committee on the Operation of the Jury System, *Report of the Committee on the "Free Press-Fair Trial" Issue*, 45 F.R.D. 391 (1969) [hereinafter cited as the *Kaufman Report*].[11] The Judicial Conference is composed of the chief judges of the 11 U.S. Courts of Appeals, the chief judge in every federal district court, the chief judge of the Court of Claims, and the chief judge of the Court of Customs and Patents. The Report's adoption "virtually makes it a directive to the federal judiciary." [12]

In four areas, the Judicial Conference essentially endorsed the ABA recommendations. It adopted verbatim the ABA proposal to restrict extrajudicial discussion of pending litigation by attorneys, *id.*, p. 404, noting that the courts "unquestionably . . . have the power to regulate this particular source of information, and there now seems to be general agreement that they have the duty to do so," *id.*, p. 406. Like the ABA, the Judicial Conference recommended that

[11] Minor amendments to the Kaufman Report's recommendations relating to attorneys (conforming to the changes made by the ABA when it incorporated the Reardon recommendations into the Code of Professional Responsibility) are reported at 51 F.R.D. 135 (1970).

[12] 1 Am. Jur. "Trials" Supp. 51 (1975).

each U.S. District Court adopt a rule prohibiting courthouse personnel from disclosing in a criminal case any information not already part of the public record, unless authorized by the court. *Id.*, pp. 407–08. Also like the ABA, the Judicial Conference called for more liberal use of traditional techniques for insuring an impartial jury—continuance, change of venue, sequestration of jurors and witnesses, voir dire, and cautionary instructions to jurors, *id.*, p. 412, but noted that these techniques were often insufficient to assure the defendant a fair trial, *id.*, p. 413. Finally, it followed the Reardon Report in suggesting that courts might issue special orders in widely publicized cases to deal with matters not adequately covered by their standing rules. Such orders might include: (1) "a proscription of extrajudicial statement by participants in the trial, including lawyers, parties, witnesses, jurors, and court officials . . . ;" (2) directions regarding the insulation of witnesses from the press; (3) direction that jurors not expose themselves to out-of-court reports concerning the case; (4) sequestration of the jury; (5) direction that names, addresses, photographs, and sketches of jurors not be publicly released. *Id.*, pp. 409–11.

In other areas, however, the Judicial Conference recommendations were more limited than those of the ABA. It explicitly rejected any direct restraint on the press, saying that such a curb is "both unwise as a matter of policy and poses serious constitutional problems." *Id.*, pp. 401–02. It declined to adopt the ABA recommendations regarding the exclusion of press and public from preliminary hearings and other hearings held outside the presence of the jury, explaining that it preferred to accumulate a body of experience with the other guidelines before deciding on such a recommendation. *Id.*, p. 403. Finally, noting that both the ABA and Medina reports had expressed a preference for self-imposed restraints by law enforcement agencies over judicial imposition of such restraints, it found sufficient progress to make unnecessary judicial intervention at that time. *Id.*, p. 403, n.19.

4. Department of Justice Guidelines

The Department of Justice has issued guidelines governing the release by its personnel of information relating to civil or criminal proceedings. "Release of information by personnel of the Department of Justice relating to criminal and civil proceedings," 28 CFR 50.2 (1975). The restrictions are substantially similar to those recommended by the Reardon, Medina, and Kaufman reports.

5. The American Newspaper Publishers Association

The American Newspaper Publishers Association issued a report in 1967 rejecting not only direct restraints on the press but also any restrictions on the source of the news.[13] The Report also voiced doubts regarding the desirability of voluntary agreements between the bench and the bar, saying that neither the press nor the bar has the right to sit down and bargain away the people's right to know.[14]

6. The American Civil Liberties Union

The American Civil Liberties Union has concluded that direct sanctions against the press would be unwise and might violate the

[13] American Newspaper Publishers Association, Special Committee on Free Press and Fair Trial, *Free Press and Fair Trial* (New York, 1967), pp. 7–8.
[14] *Id.*, p. 9.

First Amendment.[15] It has recommended instead that law enforcement agencies, prosecuting attorney's offices, and the courts adopt rules proscribing the release of prejudicial information.[16] Like the ABA, New York City Bar, and Judicial Conference recommendations, the ACLU standards would apparently apply to any information falling within specified "potentially prejudicial" categories, without regard to whether its release actually had a prejudicial effect in a particular case.

Unlike the bar and bench committees, however, the ACLU has urged that sanctions not be made applicable to defense counsel, since (1) the community is more likely to be biased against the defendant than against the prosecutor, (2) statements coming from defense counsel do not have as much public credibility or impact as statements coming from prosecutors or law enforcement officials, and (3) the constitutional guarantee of a fair trial is primarily intended to serve as a protection for the accused and therefore does not provide a basis for restrictions on defense counsel.[17]

In a recent brief, the ACLU suggested that in sensational cases the statutory limitations upon the number of peremptory challenges allowed the defense may have to yield to the Sixth Amendment guarantee of a fair trial.[18] After reviewing the range of techniques that could be used by the courts without restraining speech and arguing that the Constitution does not permit restrictions on speech where less intrusive alternatives will sufficiently protect the governmental interests at stake, the ACLU concluded:

> The "clash" between the values of free press and fair trial perceived by the courts below is not real; rarely, if ever, will there be a tension between those two great protections sufficient to require one or the other to yield. . . .[19] There are so many alternative methods to ensure impartial jurors short of direct restraints on free speech that a case in which the rights of free speech and fair trial are actually in conflict may never reach this Court.[20]

7. Twentieth Century Fund Task Force

On March 15, 1976, the Twentieth Century Fund's Task Force on Justice, Publicity and the First Amendment [21] issued a report in which it criticized (1) the imposition of direct restraints on publication, (2) "excessive use of restrictive orders", (3) "excessive reliance on secrecy", and (4) the lack of an adequate procedure for cautious development and effective review of restrictive orders.[22] The Task Force concluded that fair trial-free press restrictive orders constitute "a growing threat to freedom of the press." [23]

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[15] American Civil Liberties Union, "Policy #212: Prejudicial Pre-Trial Publicity," p. 2.
[16] *Id.*, p. 1.
[17] *Id.*, p. 2.
[18] Brief for American Civil Liberties Union, *et al.* as Amici Curiae, *Nebraska Press Association* v. *Stuart*, *supra*.
[19] *Id.* at p. 6.
[20] *Id.* at p. 22.
[21] Members of the Task Force were: Abraham S. Goldstein, Chairman, Dean, Yale Law School; Stephen Barnett, Professor of Law, University of California at Berkeley; John R. Bartels, Judge, U.S. District Ct.; Joseph Califano, Jr., Attorney, Williams, Connolly and Califano; Lenora Carter, Editor and Publisher, Forward Times; Stanley H. Fuld, Former Chief Judge, Court of Appeals of the State of New York; Nathan Lewin, Visiting Professor, Harvard Law School; C. K. McClatchy, Editor, Sacramento Bee; Michael J. O'Neill, Executive Editor, New York News; Abraham D. Sofaer, Professor of Law, Columbia Law School; Carl Stern, Washington Correspondent, NBC News; Tom Wicker, Associate Editor, New York Times; Alan Barth (Rapporteur), author, formerly editorial writer, Washington Post. Judge Bartels dissented from the Report. Other members dissented from particular recommendations or added additional views.
[22] Task Force on Justice Publicity and the First Amendment, *Rights in Conflict* (Twentieth Century Fund; 1976), pp. 4–6 [hereinafter cited as *Rights in Conflict*].
[23] *Id.*, p. 4 (emphasis deleted).

Task Force members were adamant in their opposition to direct restraints on publication either before or during trial, arguing that such restraints represented "censorship of precisely the kind that the First Amendment was designed to prohibit." [24]

Their opposition to restrictions on release of information to the press was more moderate. The report seemed to dismiss in a single sentence the possibility that the doctrines of prior restraint and "clear and present danger" were fully applicable to such restrictions:

> Trial judges undoubtedly have authority, when the trial situation requires it, to issue orders imposing silence on defendants, lawyers, witnesses, court employees, law enforcement officers, and others from whom journalists normally seek information regarding a criminal proceeding.[25]

Nevertheless, the Task Force did conclude that restraints on extrajudicial statements by trial participants were issued far more frequently than necessary and with inadequate "regard for the public's legitimate interest in crime and justice." [26] In order to ameliorate this problem, the Task Force proposed a model statute governing procedures for formulation and review of such restrictions.[27] The proposed legislation, aimed at the states but easily adaptable to the federal courts, is quite similar to that proposed by the ABA Legal Advisory Committee on Fair Trial-Free Press. There are, however, a number of differences.

First, the Task Force's proposal expressed more concern than the ABA's with providing uniformity of rules within a court system, and efficiency in formulation and review of those rules. Rather than proposing that rules be drawn separately by each court, as did the ABA, the Task Force suggests each state supreme court appoint a committee to prepare standing rules for the entire state.[28]

Second, whereas the ABA proposal left all decision-making regarding the content of rules in the hands of judges with members of the press and the bar contributing primarily through written comments and public hearings, the Task Force suggested that bench, bar, and press should all be represented on the decision-making committee.[29] Two members of the Task Force dissented from this recommendation, questioning whether the tripartite composition of the committee might not compromise the independence of the judiciary or the press, or result in vague, compromise rule-making.[30] The Task Force apparently concluded (though no explanation was offered) that a committee on which all concerns are represented would have the ability and incentive to engage in a fuller and more balanced consideration of competing interests.

Third, while in essential agreement with the ABA regarding procedures to provide notice and hearing to all interested persons or organizations, the Task Force has defined "interested persons" to include only those with a "tangible interest." [31] In context, it is clear that the definition is intended to include members of the press, but it appears to exclude other members of the public.[32]

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[24] *Id.*, pp. 15–16 (emphasis deleted).
[25] *Id.*, p. 4.
[26] *Id.*, p. 5.
[27] *Id.*, pp. 23–30.
[28] *Id.*, p. 23.
[29] *Id.*, pp. 23–24.
[30] *Id.*, pp. 31–32, 37.
[31] *Id.*, p. 30.
[32] *Ibid.*

Fourth, the Task Force decided that given the safeguards entailed in having the standard orders prepared by the tripartite committee, requiring that they be approved or rejected by the highest state court, and making them reviewable prior to enforcement, the orders should be enforceable by contempt as well as by professional sanction.[33]

With regard to special orders entered in sensational cases, the Task Force's report urged that procedures be adopted to provide for immediate review and that the underlying proceedings be stayed pending an appellate decision on the validity of the order.[34] In the event that an order were violated and subsequently found invalid, no penalties would be imposed.[35] The Supreme Court decisions holding that court orders cannot be collaterally attacked are distinguishable, according to the Task Force, in that they were all cases involving conduct, rather than pure speech. Moreover, "[f]reedom of the press is so important to free government that no single judge should be permitted to subordinate it to" his or her unconstitutional directives.[36]

In order to combat excessive judicial secrecy, the report urgently recommended development of a "judicial analogue to the Freedom of Information Act—a 'sunshine law' opening up aspects of a criminal proceeding that too frequently are closed to the press and the public and sealed even against subsequent scrutiny." [37] Special concern was expressed about the increasingly common practice of sealing information about the identities of jurors. "The public has a substantial and appropriate interest in jurors' attitudes, backgrounds and information," argued the Task Force, "as well as in knowing what kinds of jurors have not been selected." [38] Therefore, this information should be sealed only after a hearing on the matter has been conducted and only when necessary to prevent the jury from being threatened, intimidated, or harassed. The desire to prevent the press from interrogating jurors was held not to be a sufficient justification for such action.[39]

The Task Force emphasized that primary reliance should be placed on traditional methods of preventing prejudice. It suggested that where there has been pervasive publicity, an especially thorough *voir dire* examination should be conducted, with counsel authorized to question prospective jurors directly and with the defense permitted to exercise more peremptory challenges than in ordinary circumstances.[40] Finally, the report urged that courts permit an intelligent and voluntary waiver of jury trial "whenever they are convinced that granting the waiver would result in a trial of greater fairness." [41]

The Task Force concluded that effective use of *voir dire*, granting of continuances or changes in venue, instructing or sequestering the jury, permitting waiver of jury trial, and imposing "reasonable restrictions upon court officers and employees" will nearly always be adequate to insure fair trial.[42] On those "extremely rare occasions" where such measures seem to be inadequate, we would do better to let

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[33] *Id.*, p. 29.
[34] *Id.*, p. 18.
[35] *Id.*, p. 19.
[36] *Ibid.*
[37] *Id.*, p. 17.
[38] *Id.*, p. 12.
[39] *Ibid.*
[40] *Id.*, p. 11.
[41] *Id.*, p. 13.
[42] *Id.*, pp. 21–22.

a guilty person go free, we are told, than to curtail the freedom of the press.[43]

IV. Commentary and Recommendations

The hearings held in 1965 by the Subcommittee on Constitutional Rights and the Subcommittee on Improvements in Judicial Machinery came at the dawn of the era of concern over fair trial-free expression problems. Since then, decisions by the Supreme Court and the federal courts of appeal have served to clarify the state of the law in some areas but have raised new questions about others. Adoption of major reports by the bar, bench, press, and others and recent efforts of the courts to control prejudicial publicity have provided a firm basis for legislative inquiry. The Supreme Court will probably provide useful guidance on this issue in deciding *Nebraska Press Association* v. *Stuart*, No. 75–817 (pending decision at the time of this report's submission).[44]

Having laid this groundwork, we may ask: What, if anything, should Congress do about the fair trial-free expression controversy?

A. What Body Should Formulate Fair Trial-Free Expression Guidelines?

1. Commentary

Does Congress have a role to play in resolving the fair trial-free expression problem, or is the solution more appropriately left to the Judicial Conference or the courts? The answer must begin with an examination of the authority of the legislative and judicial branches under the constitutional doctrines of separation of powers and checks and balances.[1]

The principle of separation of powers has its roots in Aristotle and Locke, but the Constitution was especially influenced by the writings of Montesquieu. His *Spirit of the Laws* provided the framework against which the proposed Constitution was measured and frequently the means by which it was defended.[2] "Were the power of judging joined with the legislative," Montesquieu had written, "the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor."[3] James Madison observed that Montesquieu did not envision an absolute, inflexible separation of the functions of government. He "did not mean that these departments ought to have no partial agency in, or no *control* over the acts of each other."[4] Indeed,

> [i]t is a paradox of the separation doctrine that some blending of power is necessary to effect the checks and balances closely associated with separation. As Madison put it, unless the three branches of government "be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be maintained."[5]

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[43] *Id.*, p. 13.
[44] For a summary of the Court's decision, see Addendum, *infra* p. 81.
[1] This discussion draws on A. E. Dick Howard, *Commentaries on the Constitution of Virginia* (Charlottesville, 1974), I, 433–46.
[2] *See, e.g.*, The Federalist, No. 47 (J. Madison).
[3] Montesquieu, *L'Esprit des lois* (1748), Bk. XI, ch. 6.
[4] The Federalist, No. 47 (J. Madison).
[5] Howard, *Commentaries on the Constitution of Virginia*, I, 440.

The twin doctrines of separation of powers and checks and balances are not altogether unlike a gourmet recipe which prescribes the principal ingredients and the desired effect, and then says, "season to taste." We are given some guidance as to the limits of constitutional authority of each branch of government, and we are told that we much seek a delicate blend of separation and interrelation. After that we must fall bank on our judgment to decide what distribution of functions will best promote the desired result.

a. The Authority of Congress

Whatever the general rule-making authority of Congress, it must of course comply with the substantive guarantees of the Constitution, as interpreted by the Supreme Court. If the Court concludes that restrictions on speech are permissible only upon a showing of a clear and present danger to the fairness of a trial, Congress could not authorize such restrictions on a lesser showing.

Less obvious, however, is whether, assuming compliance with other substantive requirements of the Constitution, Congress has the constitutional authority to establish fair trial-free expression rules for the federal courts.

Article III of the Constitution provides that the "judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish." The Supreme Court has consistently held that this language confers upon Congress broad power to regulate the practices and jurisdiction of the federal courts. *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 9 (1941); *Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 510–11 (1873); *Beers* v. *Haughton*, 34 U.S. (9 Pet.) 329, 359–60 (1835); *Bank of the United States* v. *Halstead*, 23 U.S. (10 Wheat.) 51, 53 (1825); *Wayman* v. *Southard*, 23 U.S. (10 Wheat.) 1, 21–22 (1825).

At the same time, the Court has held that as soon as they come into existence, courts become possessed of certain inherent powers to protect the integrity of their processes. *Michaelson* v. *United States*, 266 U.S. 42, 65 (1924). If the power to protect jurors from prejudicial publicity inheres in the very nature of a judicial body, can that power be subjected to legislative restriction? If it cannot, any congressional efforts to deal with the fair trial-free expression issue might face insurmountable constitutional obstacles. See *In re Atchison*, 284 F. 604 (S.D. Fla. 1922). In fact, however, such obstacles appear to be insubstantial in light of the Supreme Court's consistent decisions upholding Congress's right to limit use of one of the most important of "inherent judicial powers," the power to punish for contempt.

For example, in *Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 510 (1873), the Court emphasized the importance of the contempt power but nevertheless sustained legislation which severely limited the kinds of cases in which it could be used, 86 U.S. at 510–11:

> The power has been limited and defined by the act of Congress. . . . [W]hether it can be held to limit the authority of the Supreme Court, which derives its existence and powers from the Constitution, may perhaps be a matter of doubt. But that it applies to the Circuit and District Courts there can be no question. These courts were created by act of Congress. Their powers and duties depend upon the act calling them into existence, or subsequent acts extending or limiting their jurisdiction.

Similarly, in *Michaelson v. United States*, 266 U.S. 42 (1924), the Court sustained a provision of the Clayton Act of 1914, 15 U.S.C. §§ 12

et seq., requiring jury trials in specified kinds of contempt proceedings. This time, however, the Court's dicta indicated that there were limits to the restrictions Congress could place on the courts' powers to protect the integrity of their processes. The inherent power to punish for contempt, wrote Mr. Justice Sutherland, 266 U.S. at 66,

> is not beyond the authority of Congress [citations omitted] but . . . it can neither be abrogated nor rendered practically inoperative. That it may be regulated within limits not precisely defined may not be doubted.

This dictum may imply that Congress must leave the courts adequate measures to insure a fair trial. The concurrent implication is that Congress could not decide, as some have suggested it should,[6] that in those rare cases where restrictions on speech were the only measures which could possibly assure a fair trial, society's interest would be better served by protecting the freedom of speech and freeing the accused.

The logic of Justice Sutherland's dictum is not unassailable. Congress can limit the jurisdiction of the inferior federal courts in sweeping fashion—even to the point of abolishing those courts altogether. One could argue that Congress could not be constitutionally prohibited from telling courts which are born of its will and exist at its pleasure that they may decide only those cases in which they can provide a fair trial without impinging on freedom of expression. On this reasoning, Justice Sutherland's dictum is not altogether reconcilable with other Supreme Court decisions. The other side of the coin, however, is the doctrine of unconstitutional conditions—that even if Congress need not act, if it does act (as in creating lower federal courts) it must do so in a way that respects the Constitution (*e.g.*, the right to a fair trial). As a result, one cannot lightly disregard Sutherland's dictum. We must conclude that the law is unsettled, and it is conceivable that Congress may be required to leave the courts adequate means to assure a fair trial.

At any rate, it is clear from the cases that even if promulgation of court orders or rules intended to insure a fair trial were held to fall within the inherent powers of the courts, Congress could still regulate those rules, at least so long as it did not destroy the court's ability to provide a fair trial.

Congressional restrictions on the courts' use of professional sanctions against attorneys might at first blush seem to pose a more difficult problem. Attorneys are "officers of the court, admitted as such by its order." *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 378 (1866); *Ex parte Secombe*, 60 U.S. (19 How.) 9 (1856). Moreover, the "power to disbar an attorney . . . is possessed by all courts which have authority to admit attorneys to practice." *Ex parte Robinson*, 86 U.S. (19 Wall.) 512 (1873) (dictum). In *Ex parte Secombe*, the Court held it well settled that, under the common law, "it rests exclusively with the court to determine who is qualified to become one of its officers, as an attorney and counsellor, and for what cause he ought to be removed." 60 U.S. at 13.

Like other inherent powers, however, the power to discipline attorneys may be regulated by the Congress under Article III of the Constitution. In *Ex parte Garland*, as the Court split 5–4 in striking down reconstruction legislation which would have barred anyone

[6] *See, e.g., Rights in Conflict*, p. 13.

who had supported the Confederacy from serving as an attorney in federal courts, the majority conceded, 71 U.S. at 379–80:

> The legislature may undoubtedly prescribe qualifications for the office, to which . . . [attorneys] must conform. . . . The question, in this case, is not as to the power of Congress to prescribe qualifications, but whether that power has been exercised as a [bill of attainder]. . . .

The four dissenters insisted that even the punitive statute before the Court was a valid exercise of congressional authority. They asked, 71 U.S. at 385 (Miller, J., dissenting):

> Having the power to establish the courts, to provide for and regulate the practice in those courts, to create their officers, and prescribe their functions, can it be doubted that Congress has the full right to prescribe terms for the admission, rejection, and expulsion of attorneys. . . .

Taken together, both opinions portray a court unanimous in its conviction that Congress may regulate professional discipline, provided that, in the process, it does not violate other constitutional guarantees. That view agrees precisely with the consistent theme that runs through the inherent powers cases: What Congress may create or destroy, it has broad authority to regulate.

What then are the restrictions on Congress's power to prescribe fair trial-free expression rules for the federal courts? Obviously, congressional legislation must be consistent with the substantive requirements of the Constitution as interpreted by the Supreme Court. Beyond that, Justice Sutherland's 1924 dictum may indicate that Congress is required to leave the courts adequate means to assure a fair trial. Within these limitations, however, Congress clearly has broad power to establish rules for the operation of the federal courts, even when its legislation limits inherent judicial powers.

b. The Role of the Courts

Ultimately, it is the Supreme Court's responsibility to determine which rules are constitutionally required and which are constitutionally permissible. One way the courts might conceivably determine the rules applicable to fair trial-free expression problems is through adjudication.

Assuming, as this study does, that the Constitution prohibits restrictions on speech in the absence of a clear and present danger of prejudice and of a showing that less drastic measures will be insufficient to protect a fair trial, the Supreme Court may ultimately be called upon to shoulder the task of establishing a hierarchy of prophylactic measures—ranging from the most drastic to the least drastic. It might do this in broad strokes, taking advantage of cases like *Nebraska Press Ass'n* v. *Stuart*[7] to put many of the pieces of that hierarchy in their place.[8] If the Court chooses this route, it may resolve most of the important questions in this area in a few cases, and in relatively short order. In that event, there might be little need for legislation or rules, except perhaps to strengthen traditional safeguards and improve procedures relating to the imposition and review of fair trial-free expression orders.

Alternatively, the Court might choose to proceed slowly, establishing the scale of preferred measures piece by piece, deciding only

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[7] See Addendum, *infra* p. 81.

[8] The *Nebraska* case itself deals only with direct restraints on the press.

whether the requirements of the Constitution have been met in a particular case, and hearing cases only when the most stringent ripeness requirements have been met. If it chooses this course, definitive guidance may be many years away.

Moreover, the Court could conclude that the Constitution simply does not provide all the answers to the fair trial-free expression questions. It could decide, for example, that there is no guide in the Constitution for determining whether sequestration of jurors is a less drastic means than restrictions on speech of counsel. It is even more likely that the Court will decline to prescribe the hierarchical ordering of the "traditional techniques" [9] for preventing prejudice *vis-à-vis* one another.

If the Court does choose a go-slow approach or decides that the Constitution leaves fair trial-free expression questions unanswered, the case is stronger for legislative action by Congress or by the courts. Rulemaking—formulating generally applicable rules outside the context of a case or controversy—is the second way in which the courts might determine how fair trial-free expression problems are to be resolved. There is no question that such rulemaking has a legislative character. Not only does it entail a process very different from adjudication, but it explicitly assays to go beyond determination of constitutional or statutory imperatives to select from various legally acceptable alternatives those standards which represent the wisest and most skillful accommodation of competing values.

This does not suggest, however, that such guidelines must be, or even that they should be, formulated by Congress. Separation of powers is not a rigid formula, but a practical principle of statecraft. "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). Those who wrote our Constitution "saw that a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively." *Buckley* v. *Valeo*, 424 U.S. 1, 121 (1976).

Recognizing that "[l]egislative bodies have neither the time to inquire objectively into the details of judicial procedure nor the opportunity to determine the necessity for amendment or change," [10] Congress has delegated substantial rulemaking power to the courts, 28 U.S.C. §§ 332, 1654, 2071, 2072 (1970).

Judicially created rules regulating attorneys' conduct would pose no serious separation of powers problems. Congress originally delegated regulation of counsel to the courts in § 35 of the Judiciary Act of 1789. That delegation survives today in 28 U.S.C. § 1654 (1970), which provides that "parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein." Although the federal courts have generally been content to leave regulation of attorney qualifications to the states, they are not required to do so. *Theard* v. *United*

[9] *E.g.*, change of venue, continuance, sequestration.
[10] Homer Cummings, "The New Criminal Rules—Another Triumph of the Democratic Process," 31 *A.B.A.J.* 236, 237 (1945).

States, 354 U.S. 278, 281 (1951). In light of § 1654, the courts do have the power to establish disciplinary rules for attorneys, subject to the requirements of the Constitution and any limits on that power which Congress may impose.

But what about judicial authority to make rules regulating other aspects of the fair trial-free expression problem? Title 28, U.S.C. § 2071 (1970) authorizes the "Supreme Court and all courts established by Act of Congress" to "prescribe rules for the conduct of their business," providing such rules are "consistent with the Acts of Congress and the rules of practice and procedure prescribed by the Supreme Court." Section 2072 of the same title provides direct authorization to the Supreme Court alone to "prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions." Absent congressional objection, these rules are to take effect 90 days after submission to Congress. They may not, however, "abridge, enlarge or modify any substantive right . . ." 28 U.S.C. § 2072 (1970). 28 U.S.C. § 332 (1970) establishes judicial councils consisting of all the circuit judges in each circuit. It provides that "[e]ach judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit. The district judges shall promptly carry into effect all orders of the judicial council."

These three statutes effectively authorize each federal court to make its own rules for "the conduct of its business," provided they do not conflict with the rules promulgated by higher courts; authorize the Supreme Court to promulgate procedural rules for all lower courts; and authorize the judicial council in each circuit to promulgate rules for the "administration of business" in its district courts.

The scope of the rulemaking power is not crystal clear. Despite the broad language of § 2071, both § 2071 and § 2072 have been construed to grant only procedural rulemaking power. *United States* v. *Hvass*, 147 F. Supp. 594 (N.D. Iowa 1956), *rev'd on other grounds*, 355 U.S. 570, *appeal dismissed*, 257 F.2d 812 (8th Cir. 1958). Although there appears to be no authoritative construction of § 332, it presumably would receive a similar narrow reading. If so, courts would be authorized to make rules governing the resolution of fair trial-free expression issues providing there are no conflicting federal statutes, and only to the extent that those rules may be regarded as procedural rather than substantive.

Are rules providing for the conduct of voir dire examinations or instruction of jurors or granting of continuances procedural or substantive? And what about rules regulating the conduct of parties, witnesses, or news media outside the courtroom? [11] Unfortunately, rules do not fall neatly into two "mutually exclusive categories with easily ascertainable contents." *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 17 (1941) (Frankfurter, J., dissenting). The concepts of "procedure" and "substance" are far from self-defining, and no clever verbal formula can produce a practical litmus paper test or a bright line of

[11] Note that the *Kaufman Report* did not suggest the adoption of such rules. While it did indicate that restrictions on trial participants might be imposed by special orders in particular cases, this suggestion does not implicate the rulemaking power of the courts.

demarcation between them.[12] Restrictions on trial participants, for example, might be said to be procedural rules in that they are intended to maintain the integrity of the process by which one determines substantive rights. Yet they obviously have a direct impact on important substantive rights which are protected by the First Amendment and are not themselves the subject of the primary litigation.

The procedure-substance distinction aside, one should consider the policy considerations which prompted Congress to delegate rulemaking authority to the courts.[13] The first of these considerations was that procedural rules are highly technical in nature. As such, they were thought to lie peculiarly within the expertise of the courts. Second, it was apparent that Congress had neither the time nor the interest to sustain consideration of a comprehensive set of rules of judicial procedure; rulemaking responsibilities would be better attended if they were vested in a small body with a special commitment to their development, rather than left to legislation generated by particular controversies.

Beneath these considerations lay a central theme: Procedural rules would not normally involve fundamental conflicts between competing societal values. The precise content of the rules would be less important than their being knowable and consistent and tending generally to promote the fair and efficient resolution of legal disputes. It is primarily this theme which accounts for the stiff opposition encountered by the proposed Federal Rules of Evidence when they went beyond prescriptions related to accuracy of fact-finding and attempted to prescribe the law with regard to evidentiary privileges.[14] Such privileges, critics argued, were rooted in a belief that even the pursuit of truth should sometimes give way to other societal values, such as family loyalty and stability, or the right to effective and fully informed counsel. This meant that deciding the scope of evidentiary privileges required accommodation of competing societal values and was therefore appropriate for congressional, rather than judicial, legislation. Following expressions of concern in both the House and Senate,[15] Congress acted quickly to prevent the rules from taking effect without express congressional approval.[16] When the amended rules were subsequently enacted as amended, Congress voted to leave the

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[12] The Supreme Court's decisions regarding the *Erie* Doctrine would seem not to be in point. *See, e.g., Byrd* v. *Blue Ridge Electrical Cooperative,* 356 U.S. 525 (1958); *Guaranty Trust Co.* v. *York,* 326 U.S. 99 (1945). While those decisions speak of the distinction between substance and procedure, they were concerned with settling problems of federalism in diversity cases, rather than problems of judicial power and Congressional intent. Similar words often mean very different things when applied to different issues in the law. As the Court noted in *Hanna* v. *Plumer,* 380 U.S. 460, 471 (1965): The line between "substance" and "procedure" shifts as the legal context changes. . . . It is true that both the Enabling Act and the *Erie* rule say, roughly, that federal courts are to apply state "substantive" law and federal "procedural" law, but from that it need not follow that the tests are identical. For they were designed to control very different sorts of decisions."

Of all the *Erie* decisions, only *Hanna* v. *Plumer* involved a rule promulgated pursuant to the Enabling Act, 28 U.S.C. § 2072. *Hanna* did little to define the limits of the Court's rulemaking authority, concluding only that Congress has the "power to regulate matters which . . . are rationally capable of classification as either" procedural or substantive, and that a rule providing for service of process obviously fell within the scope of § 2072.

[13] Cummings, "The New Criminal Rules—Another Triumph of the Democratic Process," 31 *A.B.A.J.* 236, 237 (1945).

[14] Hearings Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary, 93d Cong., 2d sess., pp. 1 *et seq.* 313, 314, 318, 388, 518 (1973). Hearings Before the Senate Committee on the Judiciary, 93d Cong., 2d sess., pp. 1 *et seq.* (1973).

[15] *Ibid.*

[16] Public Law 93–12.

Supreme Court the authority to make amendments, subject to congressional disapproval within thirty days, but expressly provided that any amendment affecting an evidentiary privilege "shall have no force or effect unless it shall be approved by act of Congress." 28 U.S.C.A. § 2076.

What does this mean for judicial rulemaking authority in the fair trial-free expression area? Rules which regulate the use of traditional techniques such as *voir dire* examination, granting of continuances, instruction of jurors, etc., involve primarily questions of judicial efficiency and accurate fact-finding. These are the kinds of rules that Congress left to the courts. Whether, under the circumstances, they are best left to judicial formulation may be argued, but judicial authority is clear.

Rules imposing restraints on First Amendment interests are something else. The raise broad questions of fundamental values, questions which are neither highly technical nor peculiarly within the understanding of the courts. It is arguable that any attempt by the courts or the judicial councils to establish such rules would exceed the bounds of intended congressional delegation of authority.

Such a conclusion need not lead inevitably to a call for congressional action. In one sense, a limited rulemaking authority in the courts bodes well for First Amendment interests. If judicial rules could seek to insure the fairness of trials only by prescribing techniques other than restraints on extrajudicial statements and publications, the danger of standing rules restricting speech in cases where there is no substantial problem of prejudice would be considerably alleviated. But such restrictions could still be imposed by special orders issued in particular cases since the power to issue special orders is separate from the general rulemaking authority of the courts. The practical effect would be that trial judges would have no guidelines telling them when such special orders are appropriate. Instead, they would be forced to make that decision on an ad hoc basis, under the intense pressure of a sensational trial. In such situations, their attention may be so absorbed by the immediate fair trial crisis that they will have little time or energy to consider the long-range societal values of a free press.

Even if judicial promulgation of rules imposing restraints on First Amendment interests would not exceed the bounds of the Constitution and enabling legislation, there are arguments for the view that Congress would be ill-advised to sit back and wait for others to act.

Arguably Congress may be able to undertake a more balanced examination of this problem than either the courts, the Judicial Conference, or the American Bar Association. While lawyers share equally in the stake which all Americans have in the vitality of the First Amendment, they have a special responsibility to promote the fair administration of justice. Similarly, when lawyers become judges (especially trial judges), safeguarding the integrity of the judicial process in each case before them becomes their primary responsibility and often their preeminent concern. They may, naturally enough, perceive this responsibility as the quintessential characteristic of their professional role. Moreover, many judges and lawyers understandably may feel a little less anxiety than others about the need for public scrutiny of the judicial process.

These observations must be kept in perspective. Our appellate courts especially can be proud of their record of sensitivity to the First Amendment in resolving fair trial-free expression problems. Nevertheless, for so long as judges are selected from the ranks of mortals, they will have to fight back an inclination to focus most sharply on the importance of assuring the fairest possible trial—a focus which may cause their consideration of fair trial-free expression conflicts to suffer from a variety of tunnel vision.

Congress, on the other hand, can bring to bear not only the expertise but the point of view of all those interested in the resolution of these issues. It can draw on the thoughtful reports of groups representing the bar, the bench, the press, and others. From such a foundation, Congress could effectively elicit testimony of concerned organizations and individuals, foster constructive debate among its own members, and perform the legislative function of seeking an optimum accommodation of competing values.

In addition, where legislation raises important constitutional issues, it may best be enacted by a body independent of that which must pass upon its constitutionality. This is implicit in Montesquieu's warning that there is no liberty when the judge is the legislator.[17] And it is the same premise that lay behind our forebears' decision to constitute the Supreme Court as a body independent of the legislature. "From a body which had even a partial agency in passing bad laws," argued Alexander Hamilton,

> we could rarely expect a disposition to temper and moderate them in the application. The same spirit which had operated in making them would be too apt to influence their construction: still less could it be expected, that men who had infringed the constitution, in the character of legislators, would be disposed to repair the breach in that of judges.[18]

It is well settled that courts must decide legal issues only in the context of a particular case or controversy, rather than through rendition of advisory opinions. In 1793, the young Supreme Court refused President Washington's request for an advisory opinion on legal questions "of great importance to the peace of the United States." Chief Justice Jay explained:

> [T]he lines of separation drawn by the Constitution between the three departments of the government . . . being in certain respects checks upon each other, and our being judges of a court in the last resort, are considerations which afford strong arguments against the propriety of our extra-judicially deciding the questions alluded to . . .[19]

Inherent in judicial promulgation of legislative rules are the disadvantages associated with advisory opinions. And the same court which, acting without a case or controversy before it, has promulgated the rules may later have to evaluate its own handiwork—to determine in a particular case whether the rules pass constitutional muster.

These considerations are relevant, it is true, not only to promulgation of fair trial-free expression rules, but to any exercise of rule-making authority by the Supreme Court. Nevertheless, they are especially relevant with regard to rules in this area because: (1) these issues are so closely intertwined with delicate constitutional problems

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[17] Quoted in *The Federalist*, No. 47 (J. Madison).
[18] *Id.*, No. 81 (A. Hamilton).
[19] *Muskrat* v. *United States*, 219 U.S. 346, 354 (1911).

that there is danger that the legislative and judicial roles of the court will come into conflict with one another; and (2) the issues are not so technical that they cannot be effectively dealt with by Congress, making it harder to argue that there is a countervailing necessity for judicial rulemaking sufficient to outweigh the damage done to the principles of separation of powers.

One might suggest that if these rules were promulgated by each district court individually, separation of powers problems would be minimized. As a practical matter, however, it is unlikely that most district courts would undertake the kind of thorough analysis necessary to formulate fair trial-free expression rules. One need only look at the current situation to realize that they are likely to rely on the Judicial Conference or the Judicial Councils of the circuits for authoritative guidance in this area. In reality, the rules would probably be determined largely by appellate judges.

Moreover, even if rules were formulated independently by each district court, we would pay a high price in terms of efficient and comprehensive examination of the issues, as well as national uniformity of federal court procedures.

In short, both the need to approach the issue of judicial restraints on expression from a balanced point of view, and fundamental principles underlying the separation of powers doctrine suggest that Congress should consider formulating rules for the resolution of conflicts between the rights of fair trial and free expression.

2. Conclusions

(1) Congress has constitutional authority to prescribe rules for the lower federal courts. The content of its rules must not conflict with other provisions of the Constitution and may conceivably be limited by a requirement that the courts be left adequate means to assure a fair trial.

(2) It is ultimately the responsibility of the Supreme Court to determine what rules are constitutionally required and what rules are constitutionally permissible. But to the extent that it chooses to approach fair trial-free expression questions one at a time, rather than in broad strokes, there may be a stronger case for rulemaking or legislation. Should it become evident the Constitution leaves important questions in this area unanswered, this would also bear on the need for rules or legislation.

(3) The courts have authority to promulgate rules prescribing use of procedural devices to preserve a fair trial but may not have authority to promulgate rules setting forth conditions under which freedom of expression may be abridged. Consequently, to leave rulemaking to the courts without supplementing their statutory authority might mean that trial judges would have no rule to tell them when, if ever, such abridgement may be appropriate. They would be left to make ad hoc decisions, perhaps under intense pressure generated by a sensational trial.

(4) Even assuming the courts' authority to promulgate such rules, Congress might be ill-advised to sit back and await further action by the bar or the bench. Because judges are likely to view protection of the integrity of judicial processes as their special trust, their outlook regarding fair trial-free press problems may sometimes be

skewed. Congress is in a position to draw on the expertise of a wide spectrum of groups and individuals in order to undertake a more balanced examination of the issues. Moreover, since legislation in this area would raise important constitutional issues, separation of powers principles may best be served if it is enacted by a body entirely independent of that which must pass upon its constitutionality.

(5) At the same time, the dangers of Congressional action should be considered. Determining just how to vindicate both the values inhering in free expression and the interests of a fair trial requires care and sensitivity. It is one thing for a scholar or a study group to refine an approach to the problem; it may well be a riskier thing to seek to hammer out legislation in the often awkward legislative process. Whether the First Amendment will be well served or denigrated by attempts at legislation is a question that must be asked.

(6) If hearings are held, witnesses should be asked the threshold question of the advisibility of Congressional legislation, in addition to questions regarding the form such legislation might take.

B. ACCOMMODATING THE INTERESTS OF FAIR TRIAL AND FREEDOM OF EXPRESSION

1. General Considerations

a. The Constitutional Interests at Stake

The Constitution guarantees the right to trial by an impartial jury and the rights of freedom of speech and press. These guarantees, like others in the Constitution, are not simply ends in themselves; rather, they are intended to serve larger individual and societal interests. Thus courts are often asked to determine whether various interests not explicitly mentioned by a particular guarantee fall sufficiently close to its core as to be included within the right itself. We need not, however, draw such a sharp distinction in this report. For as Congress examines not only the constitutionality but the wisdom of judicial restraints, it must go beyond discussion of whether such restraints infringe rights guaranteed by the Constitution, in order to take a broad view of the interests which those rights were intended to serve.

The interests served by the fair trial guarantees are relatively straightforward. First and foremost, the defendant has a personal right not to suffer punishment or liability at the hands of the state without procedures designed to insure a verdict that is fair and reliable. Secondly, the state and the public have an interest in seeing that the judicial system operates fairly and efficiently. Thirdly, the state and each member of the public have an interest in preserving public confidence in the ability of the judicial system to settle disputes and in the legitimacy of its verdicts.

The values advanced by First Amendment guarantees are more varied and complex. Thomas Emerson has suggested that protection of the right to free expression serves four overarching goals. First, it is essential to individual self fulfillment—to the realization of the character and potential of each human being.[20] Each of us must be free to search for truth by examining the opinions of others, and, as an integral part of that search and as an affirmation of self, to express our own ideas.[21]

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[20] Thomas I. Emerson, *Toward a General Theory of the First Amendment* (New York 1966), p. 4.
[21] *Id.*, p. 5.

Second, free expression serves to advance the society's search for truth and knowledge. We believe that "the best test of truth is the power of the thought to get itself accepted in the competition of the market," [22] and that even false statements serve as catalysts which may bring about "the clearer perception and livelier impression of truth, produced by its collision with error." [23] It follows that a system of free expression maximizes our opportunity to arrive at better judgments by "considering all facts and arguments which can be put forth in behalf of or against any proposition." [24]

Third, free expression serves to facilitate meaningful, informed. and democratic participation in social and political decision-making.[25]

Finally, Emerson suggests, the First Amendment helps maintain a healthy balance between stability and change in society. Free discussion prevents excessive rigidity, fosters adaptation, and dampens frustration and alienation by permitting dissidents to express their views and to hope for change within the system.[26]

Each of us could probably think of other broad values which are arguably advanced by the First Amendment. But it may be more useful to ask, bearing Emerson's suggestions in mind, what benefits are derived by permitting free expression regarding crime and civil and criminal litigation. Our answer to this question leans heavily on the Reardon Committee's comprehensive analysis of the benefits derived from the reporting of criminal matters.[27] Indeed, there is little we need add to the Committee's analysis except to reorder it in a way better adapted to our approach to the problem, and to add a consideration of the interests served by discussion of civil litigation.

It is worth noting at the outset that in a given case some individuals may have a greater stake in free expression than will others. Parties to the litigation, for example, will normally have an especially compelling interest in combatting any stigma which may attach to their role in the proceedings, in calling the public's attention to issues raised by the case, and in using the First Amendment to prevent abuses of governmental power. Similarly, the First Amendment interests of the general public will be especially compelling in cases such as those involving the conduct of elected officials. Subject to these considerations, the major values advanced by free expression regarding matters related to law enforcement, prosecution, and litigation may be summarized as follows.

(1) *Facilitating a fair trial.*—Permitting uninhibited discussion may sometimes lead to the production of witnesses or evidence, either through the personal investigation of reporters or because witnesses hear about the case through the media and come forward to testify. *Reardon Report*, p. 49. Free expression may also contribute to the fairness of a trial by permitting the defense to counter the prejudicial impact which an indictment may have on the impartiality of jurors. *Chicago Council of Lawyers* v. *Bauer*, 522 F.2d 242, 250 (7th Cir. 1975), *cert. denied*, 96 S. Ct. 3201 (1976).

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[22] *Abrams* v. *United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).
[23] John Stuart Mill, *On Liberty* (Oxford, 1947), p. 15, cited in *New York Times* v. *Sullivan*, 376 U.S. 254, 279 n.19 (1964).
[24] Emerson, *Toward a General Theory of the First Amendment*, p. 7.
[25] *Id.*, pp. 8–11.
[26] *Id.*, pp. 11–15.
[27] *Reardon Report*, pp. 47–51. The Committee's analysis was based on extensive interviews, distribution of questionnaires, and other research. *Ibid.*

(2) *Protecting the public safety.*—Free expression may help to promote the public safety by warning the public when criminals are at large or when the public health may be endangered by environmental pollution, unsafe drugs, inadequate safety standards, etc. It may also play a role in "uncovering the existence of crime, and seeing to it that wrongdoers are duly prosecuted," aiding in the apprehension of criminals and the solution of public health problems, and, where appropriate, providing reassurance to the public that wrongdoers are being dealt with. *Reardon Report*, pp. 47–48.

(3) *Permitting public scrutiny of the process of law enforcement.*—The glare of publicity can help to prevent abuses of police, prosecutorial, and judicial discretion. When abuses or inefficiencies do occur, the free exchange of information can help to bring them to public attention and make them the subject of constructive criticism. *Id.*, p. 50. At other times, it can serve to reassure the public that those involved in the processes of law enforcement are doing their jobs as they should be done. *Id.*, pp. 48–49.

(4) *Educating the public.*—Free exchange of information aids the public in understanding the workings of the judicial and police systems and the nature and extent of crime. Moreover, important social and political issues underlie civil and criminal cases alike. In the most immediate sense, we can all think of prosecutions or civil litigation which have directly centered around issues of governmental policy, corporate responsibility, professional standards, civil rights or civil liberties, etc. Looked at more broadly, all trials implicate fundamental policy questions, such as the morality and effectiveness of the criminal sanction, the circumstances under which individuals should be held liable to the state or to others for the consequences of their conduct, and the efficiency and reliability of the fact-finding process.

b. The Dynamics of Judicial Restrictions

It is essential to keep in mind that fair trial-free expression guidelines, whether formulated by Congress or the courts, have to be administered by human beings acting under intense pressure.[28]

The First Amendment by its very nature will commonly be undervalued unless it is viewed in long-range terms. If, for example, we evaluate the short-range benefit derived from a particular speech advocating an idea with which we strongly disagree, we might well feel that that benefit, standing alone, is not very substantial. It is only when we can stand back and view free expression in the perspective of history that we are likely to ascribe to it the importance it is due.

We have already suggested that trial judges are likely to be preeminently concerned with safeguarding the fairness of the particular trial before them. Their decisions will often be made in the heat of a situation they believe is in danger of getting out of hand. They will not have the luxury of an appellate court's hindsight to put the case in perspective and determine whether the situation really was as threatening as it seemed at the time to those most directly and personally involved.

It will be difficult, in such a situation, to look beyond the interests most immediately at stake. The trial judge is unlikely to be preoccu-

[28] Thomas I. Emerson, *The System of Freedom of Expression* (New York, 1970), pp. 9–11.

pied, for example, with the dangers of preventing public scrutiny of the judicial process in his or her courtroom, or with the long-term educational value of the proceedings. The benefits derived by free expression are likely to appear largely theoretical and remote; its beneficiaries, widely dispersed. The benefits of insuring a fair trial will be obvious, practical, and immediate, and its principal beneficiaries will be in court to emphasize its importance forcefully and dramatically. Under these circumstances, it would take a human being of unusual perspective to keep fully in focus the panoramic purposes of free expression. Few of us could be sure that we would not overlook, in the heat of trial, just how much greater is the First Amendment than the sum of its parts.

Moreover, we must remember that timeliness is the hallmark of news.[29] The press is in the business of printing news, not history,[30] and the public's attention can best be commanded by current reporting of events as they unfold. Mr. Justice Blackmun observed, as he granted a partial stay of a restrictive order, "[E]ach passing day may constitute a separate and cognizable infringement of the First Amendment. The suppressed information grows older. Other events crowd upon it. To that extent, any First Amendment infringement that occurs with each passing day is irreparable." [31]

A full recital of all the events of a trial which has been concluded will seem more remote, just as events which happen in other parts of the world seem less immediate than those which happen in our own neighborhoods. Our reaction to "stale" news is likely to be leavened by a sense that we are dealing with a *fait accompli*. And, as every writer knows, a reader's avid appetite may turn to boredom if we ask that too much material be digested at a single sitting. Thus a restrictive order may do its damage before it can be reviewed by an appellate court. "Indeed," as Professor Bickel suggests, "it is the hypothesis of the First Amendment that injury is inflicted in our society when we stifle the immediacy of speech." [32] Accordingly, we must search for guidelines that will not only provide a basis for overturning restrictive orders unjustifiably imposed but will also prevent their imposition in the first place.

These considerations indicate that we must attempt to define any limitations on free expression as narrowly and precisely as possible, lest the exceptions swallow up the rule.[33] They also imply that we should consider defining certain kinds of restrictions that should be prohibited altogether, rather than asking judges to make each of their decisions in this area on a case-by-case basis.

2. Alternatives to Restrictive Orders

Until recent years, the courts have traditionally sought to protect fair trial interests in ways which threaten neither the First Amendment nor the larger interests it is designed to serve. Indeed, it has been suggested that to characterize the fair trial-free expression issues "as involving a 'clash' of constitutional values . . . is to misconceive them."

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[29] *Bridges* v. *California*, 314 U.S. 252, 268–69 (1941).

[30] *See* Brief for the Washington Post Co., *et al.*, as Amici Curiae at 32–33, *Nebraska Press Ass'n* v. *Stuart*, No. 75–817.

[31] In Chambers opinion of Blackmun, J., in *Nebraska Press Ass'n* v. *Stuart*, 423 U.S. 1327 (Nov. 20, 1975).

[32] Bickel, *The Morality of Consent* (New Haven, 1975), p. 61.

[33] Thomas I. Emerson, *The System of Freedom of Expression* (New York, 1970), pp. 9–11.

"[R]arely if ever," it is argued, "will there be a tension between two great protections sufficient to require one or the other to yield." [34]

If taken literally, this argument overstates the case. If we were concerned only with providing a fair trial in a particular case, we would undoubtedly condone restrictions on speech which we in fact condemn. As the *Reardon Report* concluded, each of the so-called traditional techniques will often be only partially effective or will require some compromise in other fair trial rights.[35] Nevertheless, we believe that the techniques traditionally used by the courts to insure a fair trial are normally adequate to fulfill their task and are nearly always preferable to the use of orders restricting the exercise of free expression. At the same time, we urge Congress to give further study to the effectiveness of these traditional techniques and to consider the desirability of modifications to increase that effectiveness.

a. Change of Venue

Rule 21(a) of the Federal Rules of Criminal Procedure provides for transfer of proceedings to another district if the judge is "satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial . . . ."

18 U.S.C. § 3161(8)(A) (1974) indicates that a continuance is to be granted if the judge determines that "the ends of justice served by taking such action outweigh the interest of the public and the defendant in a speedy trial," and that failure to grant a continuance would be "likely" to "result in a miscarriage of justice."

After a thorough empirical study, the Reardon Report concluded that changing venue and granting a continuance were seriously underutilized but potentially very effective safeguards for the rights of defendants. The Supreme Court has repeatedly emphasized that "where there is a reasonable likelihood that the prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity." *Sheppard* v. *Maxwell*, 384 U.S. 333, 363 (1966); *see Rideau* v. *Louisiana*, 373 U.S. 723, 727 (1963); *Irvin* v. *Dowd*, 366 U.S. 717, 728 (1961).

One must question a federal standard which permits a change of venue only when a judge is fully satisfied that a fair trial is an impossibility in his or her district. Such a standard seems inconsistent with the Supreme Court's decisions and unlikely to serve either the appearance or the reality of justice. Moreover, it fails to take into account that a change of venue may often be preferable to sequestration of the jury, lengthy and detailed voir dire examination, or other techniques which might make a fair trial possible, but inconvenient or expensive.

The federal standard for granting of continuances, while less concrete and less objectionable, also seems not to conform to the "reasonable likelihood" principle endorsed by the Supreme Court. Like the federal venue provision, its application could invite reversal of convictions on appeal.

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[34] Brief of the American Civil Liberties Union, *et al.*, as Amici Curiae at 6-7, *Nebraska Press Ass'n* v. *Stuart*, *supra*.

[35] *Reardon Report*, p. 75.

Accordingly, Congress should consider amending Rule 21(a) and 18 U.S.C. § 3161(8)(A) (1974) by adopting the rule recommended by the Reardon Report:

> A motion for change of venue or continuance shall be granted whenever it is determined that because of the dissemination of potentially prejudicial material, there is a reasonable likelihood that in the absence of such relief, a fair trial cannot be had.[36]

The Reardon Report also noted that a major reason for judges' reluctance to grant changes of venue may be their inherent unwillingness to admit that they cannot assure a fair trial in their own courtrooms.[37] Others have suggested that some judges may prefer to retain jurisdiction over sensational cases because of an affinity for the limelight. Both these problems might be alleviated somewhat by a requirement that motions for change of venue be heard by a different judge than the one who will preside over the case if the motion is denied. Congress should consider such a change, while bearing in mind the loss in judicial efficiency which might result.

b. Selection of the Jury

Rule 24(a) of the Federal Rules of Criminal Procedure and Rule 47(a) of the Federal Rules of Civil Procedure provide that the court may either permit defense and prosecution attorneys to conduct the voir dire or may itself conduct it. If the court conducts the proceeding itself, it is to permit such further inquiry "as it deems proper."

Congress should consider whether counsel for the parties should be given a statutory right to question prospective jurors, subject, of course, to the court's authority to bar questions for irrelevance or because the questions themselves are likely to engender prejudice. Such a procedure might make for a more searching voir dire but could entail serious costs in terms of delay.

The Reardon Report, while expressing deep reservations about the effectiveness of voir dire, found that the procedure was viewed as relatively effective in areas where the examination of each prospective juror took place out of the presence of the others.[38] Congress should consider amending Federal Rule of Criminal Procedure 24(a) and Federal Rule of Civil Procedure 47(a) to embody the ABA's recommendation that whenever there is a "significant possibility" that some member of the venire will be ineligible because of exposure to prejudicial material, the examination of each juror shall take place outside the presence of the others.[39]

28 U.S.C. § 1870 provides that each party to a civil case is entitled to three peremptory challenges of jurors. Rule 24(b) of the Federal Rules of Criminal Procedure specifies that the number of peremptory challenges to be accorded each side in a criminal proceeding depends upon the seriousness of the offense charged and ranges from twenty challenges if the offense is punishable by death to three challenges if the offense is punishable by imprisonment for not more than one year. These numbers are probably adequate for most trials. But, as the American Civil Liberties Union argues, they have nearly always been exhausted in fair trial-free expression cases reaching the Supreme

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[36] *Reardon Report*, p. 8. Recommendation 3.2(c) (Approved Draft).
[37] *Id.*, p. 121.
[38] *Id.*, pp. 186–87.
[39] *Id.*, p. 9, Recommendation 3.4 (Approved Draft).

Court. The ACLU suggests that the Constitution may actually require that the limit on peremptory challenges yield in sensational cases to the defendant's right to a fair trial.[40] In the same vein, the Twentieth Century Fund's Task Force has suggested that more peremptory challenges should be allowed upon a showing of pervasive publicity.[41] Congress should study these recommendations and ways of implementing them.

c. Waiver of Jury Trial

Rule 23 of the Federal Rules of Criminal Procedure now provides that jury trial may be waived only "with the approval of the court and the consent of the government."

Waiver of jury trial is not a happy solution to problems of prejudice, since it forces the defendant to choose between two important constitutional rights. Nevertheless, both the American Bar Association and the Twentieth Century Fund Task Force have recommended that waiver be permitted whenever it is knowingly made and a nonjury trial would result in greater fairness.[42] The ABA would permit such a waiver whenever it was reasonable to conclude that a bench trial would be fairer.[43] The Twentieth Century Fund would permit it only when the judge was "convinced" such would be the case.[44]

It is important that both the public and the defendant know the trial was as fair as possible. Moreover, as we have already suggested, the Sixth Amendment's fair trial guarantee is intended above all to protect the rights of the defendant. Therefore we suggest that Congress consider amending Rule 23, so as to permit the defendant to waive a jury trial whenever (1) he or she reasonably concludes that, because of prejudicial publicity, a bench trial is likely to accord greater fairness, and (2) the waiver is made in writing, knowingly and voluntarily.

d. Cautionary Instructions to the Jury

At many stages of most jury trials, we rely on the good faith and ability of the jurors and assume that they will indeed follow the court's instructions to consider evidence only for a limited purpose or, in some cases, not to consider certain evidence at all. On the other hand, the "fair trial" cases discussed *supra*, pp. 9–15, make clear that the Supreme Court has less than complete confidence that jurors will always abide by a trial judge's admonitions. Generally, the Court has held that when the information presented to the jury was highly prejudicial, its admission could not be cured by judicial instruction.

There is sharp disagreement about the effectiveness of judicial admonitions to the jury as a remedy for prejudicial publicity. The conventional wisdom is that jurors routinely ignore their instructions. Thus trial lawyers frequently advise that evidence will be considered in light of all its implications, regardless of the limited purpose for which it has been admitted. The Reardon Committee found that of 54 defense attorneys asked about the effectiveness of admonitory instructions, only eight said they were "effective," another eight said

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[40] Brief of the ACLU, *et al.*, as Amici Curiae, at 22, *Nebraska Press Ass'n* v. *Stuart*, *supra*.
[41] *Rights in Conflict*, p. 11.
[42] *Reardon Report*, p. 9, Recommendation 3.3 (Approved Draft); *Rights in Conflict*, p. 13.
[43] *Reardon Report*, p. 9, Recommendation 3.3 (Approved Draft).
[44] *Rights in Conflict*, p. 13.

they were "somewhat effective," and 35 thought they were altogether "ineffective." [45] Trial judges were similarly divided in their opinions, with 27 labelling the instructions "effective," seven labelling them "somewhat effective," 17 labelling them "ineffective," and another 17 expressing no opinion.[46]

Nevertheless, the Reardon Committee concluded that "a properly framed admonition is likely to be helpful." Petitioners in the case of *Nebraska Press Association* v. *Stuart* have argued strongly that such instructions are indeed effective and have cited a number of recent studies in support of that conclusion.[47]

As we noted at the outset of this report, we have focused upon the implications of constitutional law and theory for various alternative solutions to the fair trial-free expression problem. We have made no attempt to synthesize or analyze the various empirical studies purporting to describe the effect of prejudicial publicity on the jury or the effectiveness of judicial admonitions or other tradition techniques directed at countering that publicity. The Subcommittee would be well advised to evaluate these studies before undertaking any legislative action.

C. RECOMMENDATIONS

In the commentary that follows, we return to each of the major topics we have discussed in this report. With respect to each, we (1) summarize our conclusions regarding the state of the law; (2) provide a brief recapitulation of the Judicial Conference's recommendations, since these recommendations have become rules in most of the federal district courts; (3) discuss the impact of restrictive rules on fairness of trial and freedom of expression; and (4) indicate questions which we believe Congress might consider.

This commentary is not intended to provide a blueprint for immediate legislative action. As this survey of the relevant law and major studies demonstrates, the fair trial-free expression problem is quite complex. Moreover, our inquiry has focused primarily on legal and philosophical issues, rather than on empirical studies regarding the effectiveness of various techniques for insuring juror impartiality. Accordingly, our effort will be to frame issues the resolution of which might help to bring about a better accommodation of First and Sixth Amendment values and on which Subcommittee hearings, were they to be held, might profitably focus.

1. Direct Restraints on the Press

The state of the law is probably clearer with regard to direct restraints on the press than with regard to any other area of the fair trial-free expression controversy. Unfortunately, such relative clarity still leaves room for confusion and uncertainty. As this report is written, the Supreme Court is about to issue its first decision directly addressing the legality of direct restraints on the press in the context of a threat to the fairness of a jury trial.[48] After that decision, the law will be what the Supreme Court says it is, and we make no pretense to clairvoyant foreknowledge of that decision.

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[45] *Reardon Report*, p. 256. Three did not respond.
[46] *Id.*, p. 249.
[47] *Reardon Report*, p. 145; Brief for Petitioners at 30–31, *Nebraska Press Ass'n* v. *Stuart*, *supra*.
[48] See Addendum, *infra* p. 81.

Nevertheless, the weight of precedent indicates that direct restraints on the press could not pass constitutional muster unless they were the least drastic means available to deal with a clear and present danger to the fairness of a jury trial.

All of the major reports on the fair trial-free expression issue agree that permitting such direct restraints under any lesser standard is unnecessary and unwise. Indeed, except for the Reardon Report's very narrowly drawn contempt provisions, they unanimously conclude that such restraints are inappropriate under any circumstances. Since this conclusion was shared by the Kaufman Report, it is the effective rule in the federal district courts.

Accordingly, while Congress has the authority explicitly to limit the contempt power of the federal courts if it chooses to do so, there is probably no need for legislation in this area.[49] This conclusion should be weighed in light of what the Supreme Court does in *Nebraska Press Association* v. *Stuart*.[50]

2. Orders Restricting Extrajudicial Statements by Trial Participants

The conflict between circuits as to whether orders restricting extrajudicial statements by trial participants must pass a "clear and present danger" test or only a "reasonable likelihood of prejudice" test has yet to be resolved by the Supreme Court. Indeed, the Court may shy away from explicitly adopting either of these phrases, in view of its current inclination to resolve difficult constitutional issues by balancing competing interests. Nevertheless, whatever method of analysis the Court may adopt, its firm precedents requiring a "clear and present danger" when contempt convictions were not preceded by court orders, and its consistent emphasis that prior restraints come to the court bearing a heavy burden against their validity, indicate that any less demanding standard could only be justified because of the special status of trial participants.

The Kaufman Report recommended adoption of standing rules of court placing strict limits on statements by attorneys in all criminal cases, purportedly on the basis of a finding that such statements are, as a general rule, reasonably likely to prejudice a trial. It also proposed that special orders be issued in sensational cases limiting extrajudicial statements by parties and witnesses. The report did not say what standard of necessity would have to be met before imposition of such special orders would be justified.

In evaluating both the wisdom and the constitutionality of rules restricting speech by trial participants, one must ask which categories of trial participants might be silenced, with regard to what kinds of disclosures, and under what standard of necessity. One must also examine the extent to which restrictions on one category of trial participants (*e.g.*, attorneys) may have a different impact on both First and Sixth Amendment interests than similar restrictions on another category of participants (*e.g.*, witnesses). There are, however, some general principles which cut across these categories.

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[49] One caveat should be noted to this conclusion. If no other legislative or judicial action is taken to prevent application of the UMW-Walker-Dickinson collateral bar rule to judicial restraints affecting First Amendment interests (see Recommendation regarding collateral bar, *infra*, pp. 77–78), an explicit legislative rejection of direct judicial restraints on the press might help reporters sustain an argument that such orders have "only a frivolous pretense to validity" and therefore fall within an exception to the collateral bar rule.

[50] See Addendum, *infra* pp. 81, 84.

a. Restrictions on Trial Participants Affect the First Amendment Interests of the Public

Like direct restraints on publication, restrictions on trial participants impinge on the First Amendment interests of the public as well as those of the would-be speaker. The press is, as California Attorney General Evelle Younger points out, "a conduit through which information flows to the public." It cannot print what it cannot learn. "Whichever end of that conduit is blocked, the public remains uninformed." [51] Nevertheless, it is often assumed that restrictions on trial participants are, in several respects, less damaging to First Amendment interests than direct restraints on the press.

Some have argued, for example, that restrictions on trial participants leave a safety valve for those situations in which the circumstances are so outrageous that someone will be willing to take the risk of making covert disclosures to the press. As we noted earlier, however, the Supreme Court's *Branzburg* decision, 408 U.S. 665 (1972), permits courts to hold reporters in contempt for refusing to reveal the source of such disclosures. While *Branzburg* does not totally close the "safety valve," it limits its effectiveness to those situations in which either the trial participant or a reporter or both are willing to face a very substantial risk of imprisonment. Such a contingency is a slender reed upon which to rest the public's interest in information about judicial proceedings.

Others, including Mr. Justice Stewart,[52] have argued that the phrase "or of the press" would be a constitutional redundancy unless the First Amendment was intended to provide special protection to the press as an institution. The role of the press, under this view, is that of an institutional adversary, responsible for serving as a check on the three formally established branches of government. Accordingly, restrictions on the press can pose an even greater threat to our system of government than restrictions on individual speech. Mr. Justice Stewart contends that this notion underlies the Supreme Court's decisions limiting newspaper liability for libel of public officials. This argument has yet to be adopted by the Court, however, and does not in any way derrogate the public's First Amendment interest affected by restrictions on trial participants.

Finally, it is argued that just as government (absent statutes to the contrary) can order its employees to keep secrets, so the courts, because of their special relationship with trial participants, can require silence of those who are to appear before them. It should be noted, however, that to the extent such "special relationships" are relevant to this problem, they will diminish only the First Amendment rights of the would-be speaker and the public; they will not affect the First Amendment interests served by public disclosure of information regarding judicial proceedings. As Congress examines not only the constitutionality but the wisdom of judicial restraints, it must go beyond discussion of whether such restraints infringe rights guaranteed by the Constitution in order to take a broad view of the interests which those rights were intended to serve.

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[51] Evelle J. Younger, "Fair Trial, Free Press and the Man in the Middle," 56 *A.B.A.J.* 127, 130 (1970).

[52] Potter Stewart, "Or of the Press," 26 *Hastings L.J.* 631 (1975).

b. The Burden of Justification for Restrictive Orders: Criminal Cases versus Civil Cases

Federal case law provides little hint of whether judicial restrictive orders issued in civil proceedings must bear a heavier burden of justification than those issued in criminal proceedings. The American Bar Association and the Judicial Conference would impose restrictions on the speech of attorneys in both types of cases. The history of these proposals indicates, however, that inadequate attention has been paid to differences in the interests entailed in civil and criminal proceedings.

The parties' interests in a fair trial are generally treated as less compelling when a criminal conviction is not at stake. Presumably, this reflects the fact that while civil penalties may sometimes be as severe as criminal sanctions, generally neither imprisonment nor the stigma of criminality attach to a finding of civil liability. Whatever the explanation, the lower level of protection provided in civil cases can be seen throughout our judicial system. Some assurance of fair proceedings in civil cases is implicit in the due process clause of the Fifth Amendment, but the Constitution devotes far more explicit attention to the Sixth Amendment guarantees of fairness in criminal trials. A criminal conviction will be reversed upon a showing that the defendant was unjustly deprived of the right to a public trial, but a civil verdict may be overturned only upon a showing that deprivation of that right resulted in actual prejudice. We require "proof beyond a reasonable doubt" to support a criminal conviction, but we ask only a "preponderance of the evidence" to support a civil verdict. The Supreme Court has held the Sixth Amendment's guarantee of a jury trial in criminal cases sufficiently fundamental to justify its extension to the states via the Fourteenth Amendment; it has yet to require the states to honor the Seventh Amendment's guarantee of jury trial in civil cases, and is unlikely to do so. Finally, while the Constitution requires that an indictment precede federal criminal prosecutions, no analagous protection is accorded defendants in civil suits.

The dangers of abuse accruing to use of restrictive orders in civil cases are especially troubling. Since civil defendants are not accorded the protection of the indictment process, only the motion to dismiss stands between a defendant and a frivolous suit brought precisely in order to stifle the defendant's speech. Because civil plaintiffs need not be government officials there is no popular check to prevent abuse of their power to litigate. Since civil cases can involve controversial social issues and sometimes years to resolve, restrictive orders could have a very substantial and destructive impact on the quality of public debate.

c. Restrictons on the Defense vs. Restrictions on the Prosecution

Neither the Reardon nor Kaufman Reports distinguished the burden which must be met to justify restraints on persons associated with the defense from that which must be met to justify restraints on public officials. The Reardon Report explicitly rejected such a distinction, concluding (p. 86):

> [T]he Committee is firmly convinced that it is inconsistent with the professional obligation of counsel for either side to resort to the media for public favor in a pending action.

A good argument can be made for imposing the same restrictions on both sides.[53] After all, "trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper." *Bridges* v. *California*, 314 U.S. 252, 271 (1941). It may be argued that if the prosecution resorts to publicity, the proper response for the defense is not to reply in kind but to seek the imposition of judicial restraints on the prosecution. *Reardon Report*, p. 86. Moreover, a defense team which knew it could attack the prosecution or the courts without fear of response might well be tempted to undertake a massive publicity campaign. Obviously, such campaigns could increase the difficulty of impaneling an impartial jury. They could also seriously damage public respect for our legal system and its officers. If the defendant were convicted, the one-sided publicity might make it appear that an injustice had been done. If the defendant were acquitted, it might appear that the defense had won its case not in the courtroom but in the newspapers. In either case, the appearance of justice could be undermined.

On the other hand, there are reasons to argue that restrictions on the defense constitute a less important safeguard of fair trial interests and a more serious threat to important free expression interests than do restrictions on the representatives of the state.[54] To begin with, statements by the police and prosecutors may well have a far greater prejudicial impact than statements by the defense. The public naturally assumes that the prosecutor has no vested interest in the situation and that those in authority are aware of most of the facts relevant to the case, including facts not made known to the public. Statements by the defense, on the other hand, carry with them no stamp of authority. After all, almost every defendant who doesn't plead guilty claims innocence. As the Seventh Circuit pointed out in *Chicago Council of Lawyers* v. *Bauer*, 522 F.2d 242, 250 (7th Cir. 1975), *cert. denied*, 96 S. Ct. 3201 (1976).

> Only slight reflection is needed to realize that the scales of justice in the eyes of the public are weighed extraordinarily heavy against an accused after his indictment. A bare denial and a possible reminder that a charged person is presumed innocent until proved guilty is often insufficient to balance the scales.

There is reason to be concerned that restrictions on the defense pose a more serious threat to the interests served by freedom of expression than do restrictions on persons associated with the government's case. It is likely to be the defense which has the greater stake in augmenting the effectiveness of the public trial guarantee by drawing public attention to abuses in the judicial process. Indeed, unlike restrictions on the government, defense restrictions could work to encourage abuse of prosecutorial discretion.

In addition, extrajudicial publicity may be essential to raising a defense fund sufficient to assure effective representation by counsel. While it is sometimes argued that the guarantee of counsel to indigents makes the raising of a defense fund unnecessary,[55] it blinks reality to assume that ability to pay high legal fees and other costs of litigation is uncorrelated with the quality of defense.

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[53] We are indebted to David Shapiro for his incisive comments as we developed this discussion.

[54] Our discussion of this issue draws heavily on Richard B. Hirst, "Silence Orders—Preserving Political Expression by Defendants and Their Lawyers," 6 *Harv. Civil Rights-Civ. Lib. L. Rev.* 595 (1971).

[55] *See, e.g., Chicago Council of Lawyers* v. *Bauer*, 522 F.2d 242, 254 (7th Cir. 1975), *cert. denied*, 96 S. Ct. 3201 (1976).

Moreover, the defendant may have an interest in combatting the public stigma which results from indictment. The court's verdict of acquittal may fail to restore a tarnished reputation. A criminal defendant may in a sense be on trial in the marketplace of public opinion, as well as in the courtroom.

Such considerations, suggesting that restrictions on the defense should bear a heavier burden of justification than restrictions on the prosecution, do not, however, come directly to grips with the problem posed by a defense team which takes advantage of one-sided restraints to declare open season on the prosecution and the courts. One way to ameliorate these problems might be to make restrictions on the prosecution contingent on defense behavior. As rules of evidence sometimes provide that no one may introduce reputation evidence unless the issue is raised by the defense, so fair trial-free expression rules might provide that where restrictions on extrajudicial statements are appropriate the prosecution may respond only to issues raised by the defense. We can envision two serious difficulties with such an approach. The first is that it might be difficult in practice to define the scope of the issue which has been raised by the defense and to which the prosecution is entitled to reply.[56] More fundamentally, the solution might be said to leave the defense with the option to try the case in the newspaper if it so desires. In such a situation, the courts would be left to fall back upon the techniques traditionally used to maintain the impartiality of the jury.

On the issue of restraints on the defense as compared with restraints on the prosecution, we have tried to suggest the competing interests which will bear on the Committee's making a determination in light of the weight it attaches to each of the values in conflict. A central issue, as we see it, is whether a heavier burden of justification prerequisite to the imposition of restraints on the defense should be imposed than that which must be met to uphold restraints on the state or the prosecution.

d. Bench Trials versus Jury Trials

Should restrictions on speech ever be permitted in cases which are tried to a judge rather than to a jury? The Reardon Report noted that it was primarily concerned with problems affecting jury trials (p. 22) and suggested that only in jury trials should the contempt power be available to punish extrajudicial statements not in violation of a valid order mandating the confidentiality of closed proceedings. *Reardon Report*, pp. 13–14, Recommendation 4.1 (Approved Draft). But neither the ABA nor the Judicial Conference suggested that other restrictions be available only in the context of a trial by jury. And the only Circuit to consider the question concluded that no distinction was constitutionally required. *Chicago Council of Lawyers* v. *Bauer*, 522 F.2d 242, 247 (7th Cir. 1975), *cert. denied*, 96 S. Ct. 3201 (1976). At the time of arrest and investigation, of course, we will not know whether there will be a jury trial or not. It may, however, be appropriate to draw a jury trial-bench trial distinction if there is no right

[56] *See, e.g.*, the Medina Report's description of New York's unsatisfactory experience with the New York State Bar Association's 1957 Canon 20. *Medina Report*, p. 18.

to a trial by jury under the relevant law, or if it is clear in the particular case that a jury has been waived.[57]

Two Supreme Court decisions are pertinent to this problem. In *Craig* v. *Harney*, 331 U.S. 367, 376 (1947), discussed *supra*, p. 6, the Court said:

> [T]he law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate.

More recently, in *Cox* v. *Louisiana*, 379 U.S. 559, 565 (1965), the Court upheld a statute prohibiting picketing in front of a courthouse, pointing out:

> It is, of course, true that most judges will be influenced only by what they see and hear in court. However, judges are human; and the legislature has the right to recognize the danger that some . . . will be consciously or unconsciously influenced by demonstrations in or near their courtrooms. . . . A State may also properly protect the judicial process from being misjudged in the minds of the public. Suppose demonstrators paraded and picketed for weeks with signs asking that indictments be dismissed, and that a judge, completely uninfluenced by these demonstrations, dismissed the indictments. A State may protect against the possibility of a conclusion by the public under these circumstances that the judge's action was in part a product of intimidation and did not flow only from the fair and orderly working of the judicial process.

It is important to note that the *Cox* case involved: (1) conduct, rather than speech; (2) a "time, place, and manner" restriction, rather than a ban on particular speech content; and (3) a proceeding in a state court, rather than one in a federal court, where the life tenure of judges may better serve to insulate them from public opinion.

Nevertheless, the *Craig* and *Cox* decisions do serve to spotlight the two sets of considerations which ought to determine what standard of necessity must be met prior to imposition of First Amendment restrictions in bench trials. On the one hand, judges are human and, like anyone, may be influenced by extrajudicial statements or by public opinion. On the other, they are expected to be better able to disregard evidence or pressures which might prejudice a jury. Indeed, in any bench trial a great deal of improper evidence may come to the judge's attention since he or she must ultimately rule on its admissibility.

It is undoubtedly true, as the Seventh Circuit held, that some potential benefit is derived if prejudicial material "can be kept from ever coming to the attention of a judge. . . ." [58] But bench trial restrictions pose heightened dangers to First Amendment interests. A defendant may have elected to waive the right to a trial by jury because community opinion was marshalled in favor of conviction. In such a situation, he may have an interest in being able to speak out to change public sentiment. Moreover, the need for public scrutiny may be intensified where there is no jury to check the arbitrariness of a judge.

The potential benefit which may be derived from restrictions on parties' freedom of expression in bench trials must be measured against the damage such restrictions may work on First Amendment interests. Accordingly, if Congress legislates fair trial-free expression rules, it should ask whether federal courts should be prohibited from imposing any restrictions on extrajudicial speech in bench trials or, at the least,

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[57] We are indebted to David Shapiro for helping us to refine this suggestion. Professor Shapiro did not express a view as to the validity of our conclusions in this section.

[58] *Chicago Council of Lawyers* v. *Bauer*, 522 F.2d 242, 257 (7th Cir. 1975), *cert. denied*, 96 S. Ct. 3201 (1976).

whether more compelling circumstances should be required than would be required in jury trials.

e. Restrictions on Attorneys

Broadest of all the restrictions imposed by the Kaufman and Reardon Reports are those applicable to attorneys. Premised on the notion that it is a lawyer's duty not to release information reasonably likely to interfere with a fair trial, they apply to all cases and proscribe general categories of prejudicial statements, without regard to the actual threat of prejudice in a particular case. Both the ABA and the Judicial Conference concluded that since lawyers are "officers of the court" with a special responsibility to preserve the integrity of the judicial process, they may be subjected to broader restrictions than other trial participants or the press.

There can be little doubt that it is inappropriate for any "officer of the court" intentionally to subvert the judicial system through efforts aimed at prejudicing its deliberations. Moreover, there may well be times when lawyers' efforts to generate publicity for themselves are in sharp conflict with the best interests of their client. Such efforts can no more be condoned than can any other conflict of interest. And, with the exception of the rare case where public officials stand for re-election before their trials on corruption charges can be completed, it is difficult to envision much justification for potentially prejudicial statements by a public prosecutor.

Nevertheless, it is important to think not just in terms of the label, "officer of the court," but also in terms of all of the interests affected by restrictions on defense counsel or on counsel to civil litigants.

The Supreme Court long ago recognized that the term "officer of the court," can cover a variety of very different roles. In *Cammer* v. *United States*, 350 U.S. 399 (1956), the Court was called upon to decide whether lawyers could be summarily tried for contempt under the provision of 18 U.S.C. § 401(2), which empowers a court to punish "misbehavior of any of its officers in their official transactions." The statute in question had been enacted almost immediately after the House had impeached, and the Senate had come within one vote of convicting, Judge Peck, who had sent a lawyer to prison for criticizing his decision in a case argued by the lawyer. The Court relied on the legislative history to hold unanimously that Congress had not intended that lawyers be considered court officers for purposes of that statute.[59] It explained in dicta that lawyers are primarily independent of the court, despite their importance to the judicial system, 350 U.S. at 405:

> It has been stated many times that lawyers are "officers of the court." One of the most frequently repeated statements to this effect appears in *Ex parte Garland*, 4 Wall. 333, 378. The Court pointed out there, however, that an attorney was not an "officer" within the ordinary meaning of that term. Certainly nothing that was said in . . . [that or] any other case decided by this Court places attorneys in the same category as marshals, bailiffs, court clerks or judges. Unlike these officials a lawyer is engaged in a private profession, important though it be to our system of justice. In general he makes his own decisions, follows his own best judgment, collects his own fees and runs his own business. The word "officer" as it has always been applied to lawyers conveys quite a different meaning from the word "officer" as applied to people serving as officers within the conventional meaning of that term.

[59] Harlan, J., took no part in consideration or decision of this case. Reed J., concurred only in the result.

Once it is recognized that categorizing attorneys as "court officers" does not, without more, determine the propriety of subjecting them to judicial restraints, one may begin to think in practical terms about the impact of such restrictions on First Amendment interests.

First, there are the interests of the client. The client's right to be represented by counsel does not disappear as he exits the courtroom door. It has already been noted that, depending upon the circumstances, the client may have an interest in combatting the public stigma of a criminal indictment, spotlighting abuses of prosecutorial and judicial discretion, raising a defense fund, or discussing the political significance of the trial. The client may be inarticulate or unskilled in gaining media attention and may have to rely on an attorney to protect those interests. As Congressman (later President) Buchanan argued at the conclusion of the trial of Judge Peck, it is "the imperative duty of an attorney to protect the interests of his client out of court as well as in court." [60] Indeed, restrictions on attorneys might even deprive clients of the counsel of their choice, by forcing the lawyer to choose between representing the client in court and joining in public debate. While it is sometimes argued that clients could find or hire someone other than lawyers to represent their interests out of court, this might be an expensive proposition and would do nothing to minimize prejudicial publicity.

Judicial restrictive orders aimed at lawyers also have implications for the First Amendment interests of the public and of the lawyers themselves. Indeed, the very factors which have made lawyers likely targets for gag orders may make their contribution to public discussion especially worthy of protection. Since they are peculiarly well informed regarding the processes of the judicial system, the jurisprudential notions underlying those processes, and the legal and social issues raised by their client's case, they have a special ability to contribute constructively to public debate.

Moreover, restrictions on attorneys may strike at people who, even before the litigation begins, have a keen personal interest in speaking out on the issues involved. That interest may be a principal reason for taking the case. These restrictions thus have a greater First Amendment impact than those which might be placed on jurors, who are involved in a particular case only by chance and probably would not have been prompted to join in public debate if they had not been called for jury duty.

It is in the light of these considerations that we must evaluate the per se rule adopted by most federal district courts prohibiting broad categories of statements by attorneys, regardless of whether or not any threat to a fair trial actually exists in the case in which the statements are made. We do not doubt that there is some value in a prophylactic rule which puts attorneys on notice as to the kinds of statements prone to create prejudice. Indeed, without such a rule, there undoubtedly will be times when a judicial order will come too late to prevent prejudicial statements. Nevertheless, the rule poses a problem of overkill.

An evaluation of a per se restriction must begin with the realization that only a relatively small percentage of criminal cases ever reach a jury. Many are dismissed, most are settled by guilty pleas, some are tried by judges without a jury, and only about eight percent

[60] Arthur J. Stansbury, *Report of the Trial of James H. Peck* (Boston, 1833), p. 455.

are tried by a jury. *Reardon Report*, p. 22. Moreover, only a small percentage of all jury trial cases generate enough publicity to pose any serious threat to the fairness of a trial. *Ibid.* Of course, we could never be sure in advance which cases will go to trial. But these figures tell us that in at least 92% of the cases where a per se proscription applies, it is altogether unnecessary. Moreover, in the vast majority of the remaining cases, any statement made by an attorney would be likely to be buried deep in the middle of a newspaper, if it were carried at all.

Whether the Constitution permits restraints on attorneys on the basis of anything short of a "clear and present danger," only the Supreme Court can say with certainty. The language of *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966), is unclear, and the decisions of the circuit courts add conflict to confusion. Nevertheless, the special status of lawyers, when all its implications are considered, suggests a standard of "clear and present danger" or its equivalent.

This report, however, may be less concerned with divining the Constitution's requirements than with devising desirable standards for the federal courts (so long, of course, as those standards require at least what the Constitution requires). That, at least, is a legislative question appropriately decided by Congress. It would be appropriate for Congress to ask whether there is anything inherent in the status of attorneys which, without more, justifies a dimunition of First Amendment rights and whether comment by lawyers on their pending cases should be recognized as potentially serving substantial public interests, as well as important interests of their clients and the lawyers themselves. Accordingly, thought should be given to a rule providing that no restrictions on extrajudicial statements by attorneys should be permitted except upon a finding that such statements in fact present a clear and present danger to the fairness of a particular trial. Such a rule should make it clear that restraints on an attorney's expression should be permitted only when all other methods are inadequate to prevent prejudice, that is, when extrajudicial statements will make a fair trial a practical impossibility. Moreover, it should distinguish between opinions regarding matters of law, which should not be restricted under any circumstances, and comments regarding questions of fact.[61]

Bearing in mind the dynamics of the situation in which restrictive orders are likely to be applied, Congress may conclude that no statutory standard is likely to prevent overzealous use of restrictive orders by the trial courts. In that event, Congress should weigh the threat to the First Amendment occasioned by excessive reliance on restrictive orders against the threat to the judicial process which would result from a total ban on restrictive orders. If it is felt that cases in which restrictive orders would be appropriate would be extremely rare, Congress could consider prohibiting the federal courts from issuing restrictive orders against defense attorneys in criminal cases, and against any attorneys in civil cases. It should be noted, however, that prohibiting courts from ever imposing such restrictive orders in *specific cases* (as opposed to general orders) would leave no room even for the most extraordinary of circumstances.

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[61] We are indebted to David Shapiro for suggesting this last distinction. See also *Chicago Council of Lawyers* v. *Bauer*, 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 96 S. Ct. 3201 (1976).

f. Restrictions on Parties

The parties to a legal dispute obviously have a particular stake in the fairness with which that dispute is resolved. They also have a special incentive to call to the attention of the public any abuses or unfairness in the process by which their guilt or innocence, their liability or right of recovery, are determined.

Moreover, parties do not have the lawyer's luxury of escaping gag orders by withdrawing from the case. A criminal defendant can "withdraw" only by plea bargaining; a civil litigant can withdraw only by settling or forfeiting a disputed claim.

For these reasons, restrictions on parties have obvious implications for First Amendment interests. Accordingly Congress should ask whether the federal courts should be forbidden to impose restrictions on extrajudicial statements by parties except where there is a clear and present danger that such statements will make a fair trial a practical impossibility. If one entertains the view (discussed *supra*) that restrictions on persons associated with the defense should bear a heavier burden of justification than other restrictive orders, it would be appropriate to consider whether to prohibit the federal courts from imposing, or to make it more difficult to impose, any restrictions on the speech of criminal defendants outside the courtroom.

g. Restrictions on Witnesses

While defendants in federal cases would at least not be subject to restrictions on expression until they have been indicted by a grand jury, or failed in a motion to dismiss, witnesses have no such protection. A broad order silencing witnesses would give the government or private individuals the power to gag anyone who might conceivably have input into the case. A ban such as that issued (though later vacated) in the "Gainesville Eight" case barring any contact between the press and any members of the Vietnam Veterans Against the War, provides a striking example of the uses which may be made of such an order.[62]

Such considerations would suggest considering a legislative rule that the federal courts may impose restrictions on a potential witness only if it finds extrajudicial statements by that particular witness pose a clear and present danger of making a fair trial a practical impossibility.[63]

3. Secrecy and Closure of Judicial Proceedings [64]

Congress might create a qualified statutory public right of access to judicial proceedings. Such a statute would not prevent resolution of the constitutional status of the public's right of access, if only because state cases could still reach the Supreme Court. But it would establish the principle that judicial proceedings must be open to public scrutiny unless measures other than closure are inadequate to assure a fair trial or to prevent injury to the security of the nation.[65]

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[62] *United States* v. *Columbia Broadcasting System*, 497 F. 2d 102 (5th Cir. 1974); *see also United States* v. *Columbia Broadcasting System*, 497 F. 2d 107 (5th Cir. 1974).

[63] As we noted at the outset of this report, we have not examined the problems which may be involved in investigations by grand juries. Accordingly, we should not be understood to advocate any new rule applicable to grand juries.

[64] Nothing contained herein is intended to apply to the special problems of grand jury secrecy.

[65] An exception should be made for situations in which a witness is required to undress.

The legislation could also provide that a record shall be made of any proceedings closed to the public and that any information sealed by the court shall be made available immediately after the conclusion of the trail,[66] unless continued secrecy is required to protect the security of the nation.

The Twentieth Century Fund Task Force argues cogently for a recognition of the public's interest in the jury selection process.[67] Accordingly, the courts could be required to disclose immediately information regarding the identities of those rejected for jury service. We are not convinced, however, that the identities of those selected to sit as jurors need be disclosed prior to the conclusion of the trial. As one Task Force member commented in dissent from the group's recommendation, withholding of such information may be the only safe way to protect jurors from improper questions and contacts by members of the press, friends of the parties, or personal acquaintances. Moreover, such information once disclosed cannot be called back after an immediate threat arises.[68] From a First Amendment standpoint, this information will again be of current interest on the day the verdict is handed down. Congress might consider a rule requiring that the names and identities of jurors be disclosed as soon as the trial is over [69] unless the judge finds there is reason to believe that the jury may be threatened or harassed.[70]

Reflection on whether to create a statutory public right of access to judicial proceedings would be enhanced by considering the kinds of factual situations that might arise. To take an extreme case, suppose the defendant in a criminal trial moves before trial to suppress a confession and asks to have the public excluded. Assuming that a complete transcript is kept and released as soon as the trial is over or the matter is disposed of without trial, a good argument can be made for closure. Apart from the fair trial-free expression problem, one should mull how a statute, if one be adopted, might affect the traditional view that depositions are not open to the public (the transcripts, of course, may if filed become part of the public record), that pretrial conferences at which settlement is discussed are held in chambers, that sidebar conferences and meetings in chambers are sometimes held in the course of trials, that certain aspects of custody proceedings (or particularly embarrassing aspects of other proceedings) are held in private at the request of the parties, etc.[71]

4. Reviewability of Restrictive Orders

Persons who are directly restrained by silence orders or by orders closing judicial proceedings will probably be able to seek immediate review of those orders on appeal. Whether reporters can obtain review of an order proscribing extrajudicial statements by trial participants remains an open question. At best, they can do so only by travelling

[66] The Reardon Report recommended that a rule to this effect be made applicable to all pretrial hearings closed to prevent prejudicial publicity. *Reardon Report*, p. 7, Recommendation 3.1 (Approved Draft).

[67] *Rights in Conflict*, p. 12.

[68] Comment by Stephen Barnett, *ibid.*

[69] After the bribery trial of John Connally, Judge George Hart, Jr. refused a request to disclose the names of jurors three weeks after the verdict was in. See Washington Post, May 26, 1975, p. A1.

[70] We reach no conclusion as to the appropriate standard of proof for the judge's finding. *Cf. Rights in Conflict*, p. 12.

[71] In the criminal trial context, *cf. Rights in Conflict*, p. 17: "Standards might well be set for bench conferences, discussions in chambers, and the sealing of public records or other written material so that the public interest in public trials would not be disregarded."

the arduous route of a petition for an extraordinary writ. Moreover, even once they start the appellate process, neither press nor parties have any assurance that a ruling will come in time to be of any value.

A person who chooses to defy an invalid order before or while appealing may find an appellate court agreeing that the order was patently unconstitutional, but sustaining a conviction for contempt. One can only speculate as to whether other federal courts will join the Fifth Circuit in holding that judicial restrictive orders may not be collaterally attacked. We conclude, however, that application of that doctrine to orders prohibiting pure speech on the basis of content undermines the First Amendment.

As the Supreme Court recognized in *Bridges* v. *California*, 314 U.S. 252, 268 (1941), timeliness is the key to the effectiveness of public expression. The damage inflicted by a prior restraint on speech or publication is likely never to be undone. An appellate decision which overturns a restrictive order only after the underlying case and the invalid order have already been terminated is a pyrrhic victory indeed. A decision which invalidates an order and then sends its violator to jail for his or her pains in protecting the First Amendment is disturbing.

Accordingly:

(1) Congress should consider enacting legislation aimed at providing expedited review of judicial restrictive orders. It may also want to consider requiring circuit courts to determine, within a very short time after receiving an appeal of such an order, whether there are reasonable grounds to believe that the order might be invalid. If the circuit court concludes that reasonable grounds did exist, the trial court could be required to choose between staying the restrictive order and postponing the trial pending a final decision.

(2) Congress should consider enacting legislation providing explicitly that members of the press (and perhaps other members of the public) have standing to challenge orders restricting extrajudicial statements by trial participants.

(3) Congress should consider amending 18 U.S.C. § 401(3) (1970) (which defines the power of the courts to punish violations of court orders) to provide explicitly that—at least where orders restricting speech on the basis of its content are concerned—the courts shall have no power to punish for contempt unless the order violated was valid.[72]

5. Procedural Due Process

In light of its other First Amendment due process decisions, noted *supra* pp. 33–34, it seems likely that the Supreme Court would require that notice and an opportunity for hearing be accorded persons who are to be directly restrained by judicial restrictive orders. To date, however, such a procedure has rarely been followed by the trial courts. Moreover, the only federal appellate court decision dealing with the rights of the press when restrictions on trial participants are ordered held that the press was not entitled to procedural safeguards in that situation.

The Kaufman Report (and, presumably, the district court rules based upon it) does not provide for any procedural safeguard precedent to the issuance of restrictive orders—even for those directly

[72] Congress may want to consider limiting the power of the courts to punish violation of any invalid court order, whether restricting speech or not. Whether such legislation would be advisable or constitutional goes well beyond the scope of this study.

restrained. The Reporters Committee for Freedom of the Press, the ABA Legal Advisory Committee on Fair Trial-Free Press, and the Twentieth Century Fund's Task Force have all recommended adoption of a number of procedural steps to be following before any standing guidelines or special orders restricting speech are adopted.

The strictures of the First Amendment raise serious questions about rules which would restrict any categories of speech, especially by persons not associated with the government, in cases where the applicable standard of necessity had not been met. One should pause before accepting the conclusions of the ABA Legal Advisory Committee and the Twentieth Century Fund Task Force permitting enforcement—through use of the contempt power or use of professional discipline—of such general rules applicable to all cases.

Nevertheless, there is a need for voluntary guidelines, developed through informal procedures providing all interested parties ample opportunity for notice and hearing. Such guidelines should serve to warn trial participants that certain kinds of statements are especially prone to have a prejudicial impact on a jury, and should provide guidance to judges in their thinking about fair trial-free expression problems and solutions.

Recommendations urging that opportunities for notice, hearing, and expedited appellate review be accorded all interested persons in connection with imposition of restrictive orders are among the most important to emerge from many years of debate over fair trial-free expression issues. In thinking about this subject, Congress should note the ABA Legal Advisory Committee's work in this area and the ABA House of Delegates action in summer 1976.[73] Moreover, in light of the Judicial Conference's past willingness to adopt the ABA's recommendations on many fair trial-free expression issues, and in light of the procedural character of these proposals, Congress should consider whether to accord the Judicial Conference and the circuit Judicial Councils an opportunity to adopt their own due process rules.

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[73] See *Revised Draft: Recommended Court Procedures To Accommodate Rights of Fair Trial and Free Press* (1975), approved by the ABA House of Delegates in August 1976. American Bar Ass'n, *Summary of Action of the House of Delegates, 1976 Annual Meeting* (Aug. 1976), p. 9.

ADDENDUM

Comment on Nebraska Press Association *v.* Stuart

When the report on fair trial and free expression was submitted to the Subcommittee on Constitutional Rights, *Nebraska Press Association* v. *Stuart* was still pending in the Supreme Court. Since the report's submission, the case has now been decided. 96 S. Ct. 2791 (1976). When the report and the Court's decision are compared, the principal effect of the decision is to reinforce the report's conclusions.

The *Nebraska* decision focused upon the circumstances, if any, under which direct restraints upon the press might be permitted in the interest of assuring a fair trial. The case arose out of the sensational trial of a defendant charged with murdering all six members of a family in a small Nebraska town. Upon application of the county attorney and the defendant, the county court had issued a broad restrictive order, requiring adherence to the terms of the voluntary Nebraska Bar-Press Guidelines. After the defendant had been bound over for trial in the state district court, that court found a clear and present danger that publicity could impinge on the defendant's right to a fair trial and entered a modified version of the restrictive order, applicable only until a jury had been selected.

Petitioners, the Nebraska Press Association and others, sought stays first from the Nebraska Supreme Court, then from Mr. Justice Blackmun, sitting as a Circuit Justice. When, on November 20, 1975—nearly a month after the original order had been entered and twenty days after the press had applied for a stay—the Nebraska Supreme Court had not acted, Justice Blackmun concluded that the delay had exceeded "tolerable limits." 423 U.S. 1327, 1329 (1975). Accordingly, he entered an order staying the incorporation of the Bar-Press guidelines but leaving stand those portions of the district court's order that prohibited reporting the existence of any confession or any facts so "strongly implicative" of the accused that they would irreparably impair the ability of those exposed to them to reach an independent and impartial judgment as to guilt. 423 U.S. at 1333. On December 2, the Nebraska Supreme Court modified the district court's order to prohibit only reporting admissions made by the defendant to anyone other than the press and other facts "strongly implicative" of the accused. That is how the order stood when the Supreme Court granted certiorari.

By the time the Supreme Court had heard and decided the case on the merits, the restrictive order had expired and the trial had been concluded. Nevertheless, the Court concluded that the case was not moot, since it was "capable of repetition, yet evading review." 96 S. Ct. at 2797. The justices were apparently unanimous on this point, and their conclusion indicates that mootness, in the form of trials having run their course, will not preclude judicial resolution of future fair trial-free expression issues.

Chief Justice Burger's opinion in *Nebraska Press Association* was barely a majority opinion. Burger was joined by only four other justices (White, Blackman, Powell, and Rehnquist). Six justices voiced their views in four concurring opinions. All the Court's members, however, followed essentially the same line of reasoning described in this Report, laying stress on the presumption against prior restraint and on the special importance of reporting of judicial proceedings.

Prior restraints on speech and publication, Burger said, "are the most serious and the least tolerable infringement on First Amendment rights." Prior restraints have "an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time." And protection against prior restraint "should have particular force as applied to reporting of criminal proceedings. . . ." That an order does not prohibit publication but only delays it does not remove the dangers of prior restraint. 96 S. Ct. at 2802–03.

The applicable standard of necessity, the Court concluded, was the version of the clear and present danger test formulated by Learned Hand and adopted by the Court in *Dennis* v. *United States*, 341 U.S. 494 (1951): whether "the gravity of the 'evil,' discounted by its improbability, justified such invasion of free speech as is necessary to avoid the danger." 96 S. Ct. at 2804.

To determine whether the Nebraska judge's order could survive the demands of the clear and present danger test, reinforced by the odium of prior restraint, the Court considered three factors:

(1) the nature and extent of pretrial coverage;

(2) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and

(3) how effectively a restraining order would operate to prevent the threatened danger.

As to the extent of a threat to a fair trial, the Court thought the trial judge had been justified in concluding that the case would engender intense and pervasive pretrial publicity and that publicity "might impair the defendant's right to a fair trial." But the Court emphasized that the judge's conclusion as to the impact of such publicity on prospective jurors must of necessity be speculative.

As to measures short of an order restraining all publication which would have insured a fair trial, the Court considered the traditional alternatives—change of trial venue, postponement of the trial, voir dire examination, and sequestration of jurors. The Nebraska courts had made no finding that such alternative measures would not have protected the defendant's rights; indeed, the Court concluded that the record was lacking in evidence to support such a finding. The Court's decision rather carefully distinguished between the alternatives it had suggested and those which had been proposed by other groups but not yet approved by the Court, thus leaving for another day any decision as to the constitutionality of restraints on trial participants and closure of judicial proceedings. 96 S. Ct. at 2805 n.8.

Turning to the third factor, the probable efficacy of prior restraints on publication in safeguarding the fairness of the trial, the Court noted that the limits on the trial court's territorial jurisdiction and the need for in personam jurisdiction presented obstacles to an order purporting to apply to publication taking place outside its jurisdic-

tion. The Court thought the effectiveness of restraints further limited by the difficulty of predicting what kind of information will in fact prejudice jurors and the difficulty of drafting orders that will effectively keep prejudicial information away from prospective jurors. Finally, the Court pointed out that the rumors which might be generated in a news vacuum "might well be more damaging than reasonably accurate news accounts." These considerations led the Court to conclude that it was "far from clear" that prior restraints would have protected the defendant's rights. 96 S. Ct. at 2806.

The Court concluded that the Nebraska order was unconstitutional in several respects.

To begin with, to the extent that the order prohibited the reporting of evidence adduced at open preliminary hearing it "plainly violated settled principles" that "there is nothing that proscribes the press from reporting events that transpire in the courtroom." 96 S. Ct. at 2807, citing *Shepard* v. *Maxwell*, 384 U.S. 333, 362–63 (1966). The court's use of the *Sheppard* language erases any doubts that may have remained regarding the absolute prohibition, applicable even in the face of threats to a fair trial, against restrictions on the reporting of open judicial proceedings—a point most commentators felt already rather well settled. See this Report, p. 17; *Reardon Report*, pp. 13–14, 27, 153.

Second, the Court held that a ban on reporting of information "strongly implicative" of the accused was "too vague and too broad to survive the scrutiny we have given to restraints on First Amendment rights." 96 S. Ct. at 2807.

Finally, and most importantly, the Court held the order unconstitutional because it failed to meet the requirements of a clear and present danger test made more rigorous by the demands of prior restraint doctrine. The key language is worth quoting, 96 S. Ct. at 2807:

> The record demonstrates . . . that there was indeed a risk that pretrial news accounts, true or false, would have some adverse impact on the attitudes of those who might be called as jurors. But on the record now before us it is not clear that further publicity, unchecked, would so distort the views of potential jurors that 12 could not be found who would, under proper instructions, fulfill their sworn duty to render a just verdict exclusively on the evidence presented in open court. We cannot say on this record that alternatives to a prior restraint on petitioners would not have sufficiently mitigated the adverse effects of pretrial publicity so as to make prior restraint unnecessary. Nor can we conclude that the restraining order actually entered would serve its intended purpose. Reasonable minds can have few doubts about the gravity of the evil pretrial publicity can work, but the probability that it would so here was not demonstrated with the degree of certainty our cases on prior restraint require.

This language is likely to be invoked as a new and more precise version of the clear and present danger test to be used in future fair trial-free expression cases. At least where they impose direct restraints on the press, restrictive orders will be upheld only where it can be shown to the Supreme Court's satisfaction—the Court undertaking its own review of the record—that (1) there exists a clear threat of intensive and pervasive prejudicial publicity, (2) publicity not only could but in fact clearly would so distort the views of potential jurors that "12 could not be found" who would, under proper instructions, render a verdict based only on evidence presented at trial, (3) other alternatives could not prevent the need for prior restraints, and (4)

the restrictive order under attack actually would have served to preserve the fairness of the trial.

It is difficult to imagine a silence order that would survive so rigorous a standard, especially in light of the Court's observation that any conclusion as to the impact of publicity on prospective jurors is "of necessity speculative," dealing with factors "unknown and unknowable." 96 S. Ct. at 2804. Chief Justice Burger was unwilling to lay down an absolute ban against restrictive orders on the press or to rule out the "possibility of showing the kind of threat to fair trial rights that would possess the requisite degree of certainty to justify restraints." 96 S. Ct. at 2808. But the hurdle a silence order would have to face is likely to prove insurmountable. Indeed, the court understood it was setting a rigorous standard for future cases and that other restraining orders are as likely to fall as did the Nebraska order, 96 S. Ct. at 2807:

> Of necessity our holding is confined to the record before us. But our conclusion is not simply a result of assessing the adequacy of the showing made in this case; it results in part from the problems inherent in meeting the heavy burden of demonstrating, in advance of the trial, that without prior restraint a fair trial will be denied. The practical problems of managing and enforcing restrictive orders will always be present. In this sense, the record now before us is illustrative rather than exceptional. It is significant that when this Court has reversed a state conviction because of prejudicial publicity, it has carefully noted that some course of action short of prior restraint would have made a critical difference.

Moreover, there may be five justices willing to hold that prior restraints on the press are never permissible. Three justices—Brennan, Stewart, and Marshall—took that "absolutist" position in their concurring opinion in *Nebraska Press Association*. "I would hold," said Brennan, "that resort to prior restraints on the freedom of the press is a constitutionally impermissible method for enforcing" the right to a fair trial. 96 S. Ct. at 2809. Justice White joined the majority opinion but wrote separately to voice his "grave doubt" whether silence orders aimed at the press "would ever be justifiable." Expressing reluctance to announce such a per se rule "in the first case in which the issue has been squarely presented," he nevertheless served notice that he might well find himself in Justice Brennan's camp:

> If the recurring result, however, in case after case is to be similar to our judgment today, we should at some point announce a more general rule and avoid the interminable litigation that our failure to do so would necessarily entail.

96 S. Ct. at 2808. Similarly, Mr. Justice Stevens, also concurring, wrote: "I do, however, subscribe to most of what Mr. Justice Brennan says and, if ever required to face the issue squarely, may well accept his ultimate conclusion." 96 S. Ct. at 2830.

What bearing does the decision in *Nebraska Press Association* v. *Stuart* have on the conclusions and recommendations set out in the report to the Subcommittee on Constitutional Rights? The report suggests that a version of the clear and present danger test made more rigorous by the application of prior restraint doctrine would probably bar imposition of direct judicial restraints on the press. Accordingly, the report says "there is probably no need for legislation in this area." *Supra*, p. 67. That conclusion is obviously reinforced by the *Nebraska* decision.

The Court in *Nebraska* reserved judgment, however, on the validity of orders restricting speech by trial participants or closing judicial proceedings. 96 S. Ct. at 2805 n.8. The report to the Subcommittee dis-

cusses the interests involved, including the public's First Amendment interests, and questions whether there is something about the special status of trial participants that justifies restricting their out-of-court speech upon a lesser showing than clear and present danger coupled with the assumed invalidity of prior restraints. *Supra* pp. 67 *et seq.* Justice Brennan, relying on *Sheppard* v. *Maxwell*, *supra*, assumes in his Nebraska concurrence, 96 S. Ct. at 2823 n.27, that restrictions by a trial judge on lawyers, parties, witnesses, or court officials would be permissible, but the *Nebraska* decision otherwise does little to resolve this question. Similarly *Nebraska* does not tell us whether the public, as opposed to the defendant, has a constitutional right to open judicial proceedings.

Future Supreme Court decisions may take up questions unanswered by *Nebraska Press Association*, such as restrictions on trial participants or closure of judicial proceedings. But at the moment, with the decision in the *Nebraska* case at hand, it seems that the question whether to hold congressional hearings, and whether legislation might come out of those hearings, turns on about the same considerations as bore on the report at the time of its submission.

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